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IN THE

Supreme Court of the United States

October Term, 1957

No. 621

WELDON BRUCE DAYTON, *Petitioner*

v.

JOHN FOSTER DULLES, individually and as Secretary of State of the United States

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On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinions in the Court of Appeals have not yet been reported; they appear at R. 291-302. The opinion of the District Court (R. 280-289) is reported at 146 F.Supp. 876.

Jurisdiction

The judgment of the Court of Appeals was entered on October 24, 1957 (R. 303). The petition for certiorari was filed on November 21, 1957, and granted on January 6, 1958 (R. 304). The jurisdiction of the Court rests on 28 U.S.C. 1254(1).

Statutes and Regulations Involved

Section 51.135 of the Passport Regulations * (22 C.F.R. 51.135) reads, as follows:

> § 51.135. *Limitations on issuance of passports to persons supporting Communist movement.*—In order to promote the national interest by assuring that persons who support the world Communist movement of which the Communist Party is an integral unit may not, through use of United States passports, further the purposes of that movement, no passport, except one limited for direct and immediate return to the United States, shall be issued to:
>
> (a) Persons who are members of the Communist Party or who have recently terminated such membership under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they continue to act in furtherance of the interests and under the discipline of the Communist Party;
>
> (b) Persons, regardless of the formal state of their affiliation with the Communist Party, who engage in activities which support the Communist movement under such circumstances as to warrant the conclusion—not otherwise rebutted by the evidence—that they have engaged in such activities as a result of direction, domination, or control exercised over them by the Communist movement;
>
> (c) Persons, regardless of the formal state of their affiliation with the Communist Party, as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement.

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* We use the term "Passport Regulations" to refer to those regulations of the Secretary of State titled "Passports" and codified at 22 C.F.R. 51.135-51.170. Other of the Secretary's regulations titled "Travel Control of Citizens and Nationals in Time of War or National Emergency" and codified at 22 C.F.R. 53.1-53.7 are also relevant. Pertinent provisions of these latter are set forth in the Appendix, *infra*, pp. 84 *seq.*

The other sections of the Passport Regulations and other pertinent regulatory provisions are set forth in the Appendix, *infra*, pp. 77 *seq*.

The statutes involved are the Act of July 3, 1926, c. 772, § 1, 44 Stat. (Pt. 2) 887, 22 U.S.C. 211a; the Immigration and Nationality Act of 1952, § 215(a), 66 Stat. 190, 8 U.S.C. 1185; the Internal Security Act of 1950, Tit. I, § 6, 64 Stat. 993, 50 U.S.C. 785; the Act of July 27, 1868 (Expatriation Act of 1868), 15 Stat. 223, R.S. § 1999; and the Administrative Procedure Act, §§ 5(b), (c), 7(c), (d), 8(b), 10(e), 60 Stat. 239, 241, 242, 243, 5 U.S.C. 1004(b), (c), 1006(c), (d), 1007(b), 1009(e). The pertinent provisions of these statutes are set forth in the Appendix, *infra*, pp. 72-77.

Questions Presented

1. Whether the denial of a passport to petitioner, a citizen of the United States, by the Secretary of State, on the basis of information disclosed neither to petitioner nor to the courts, violates the due process clause of the Fifth Amendment.

2. Whether the proceeding in the State Department was governed by the formal requirements of the Administrative Procedure Act; and, if so, whether it complied with those requirements.[1]

3. Whether the passport denial, on the stated criteria —that the Secretary has reason to believe that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and "because the issuance of a passport would be contrary to the national

[1] This question was not set forth in the petition for certiorari. It is presented and briefed here because, in our opinion, it reflects "a plain error" in the decision below (Rule 40(d)(2), S.Ct. Rules).

interest"—violates petitioner's rights to due process under the Fifth Amendment.

4. Whether that passport denial lacks any rational basis and is grounded on the doctrine of "guilt by association", in violation of petitioner's rights under the First and Fifth Amendments.

5. Whether that passport denial and the Passport Regulations, as applied to petitioner, abridge petitioner's First Amendment right of free association; violate Article I, section 9 of the Constitution; and unlawfully deprive petitioner of his rights of travel and to due process, in violation of the Fifth and Ninth Amendments to the Constitution.

6. Whether the Passport Regulations are invalid because they are not authorized by Congress and because they conflict with the Congressional intent reflected in other legislation.

Statement of the Case

Petitioner, thirty-nine years old, is a native-born citizen of the United States, the descendant of early settlers in colonial America. He is a physicist by education and training, having at various times been employed as physicist and teacher by the University of California, the Department of the Navy (in a degaussing project), the Office of Scientific Research and Development (in a rocket project), Cornell University, and Massachusetts Institute of Technology. (R. 12-13, 24-28, 35-40, 70-71).

On March 5, 1954, petitioner filed an application for a passport to enable him to travel to Bombay, India, there to accept a position as research physicist at the Tata Institute of Fundamental Research (R. 6).[2]

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[2] The Tata Institute is a recognized post-graduate institute affiliated with the University of Bombay. *World of Learning*, 484 (London, 1957); *Universities of the World Outside the United States*, 530 (1950). It is recognized as one of the world's leading

On April 14, 1954, the Director of the Passport Office advised petitioner that his passport application was being denied because the Department of State "feels that it would be contrary to the best interest of the United States to provide you passport facilities at this time" (R. 10). Thereupon, petitioner conferred with an officer of the Passport Office; fully responded to his numerous inquiries; and, upon his request, executed a detailed affidavit containing a full statement of the matters about which inquiry had been made (R. 6, 10-42). In that affidavit, petitioner averred, *inter alia,* as follows (R. 12):

> "I am not now and I have never been a member of the Communist Party.
>
> "With the possible exception of a casual and brief association with the work of the Joint Anti-Fascist Refugee Committee for a few months in 1941 and in 1942 (all as related below); I am not now and never have been a member of any of the organizations designated on the Attorney General's list (which I have carefully examined).
>
> "I am not now engaged and I have never engaged in any activities which, so far as I know or at any time knew, support or supported the Communist movement.
>
> "I wish to go abroad for the sole purpose of engaging in experimental research in physics at the Tata Institute of Fundamental Research in Bombay. I am not going abroad to engage in any activities which, so far as I know or can imagine, will in any way advance the Communist movement."

On June 24, 1954, the Director of the Passport Office advised that "in view of certain factors of . . . [petitioner's] case which I am not at liberty to discuss with him, the Department must adhere to its previous decision that it would be contrary to the best interests of the

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centers of cosmic-ray research. Its head, Dr. Homi J. Bhabha, is one of the world's most distinguished theoretical physicists and was president of the International Conference on the Peaceful Uses of Atomic Energy, held in Geneva, Switzerland, in August, 1955.

United States to provide . . . passport facilities at this time" (R. 42-43). Some months thereafter, the Director notified petitioner that (R. 44):

> "In arriving at its decision to refuse passport facilities . . ., the Department took into consideration his connection with the Science for Victory Committee and his association at that time with various communists. However, the determining factor in the case was . . . [petitioner's] association with persons suspected of being part of the Rosenberg espionage ring and his alleged presence at an apartment in New York which was allegedly used for microfilming material obtained for the use of a foreign government."

On November 8, 1954, in accordance with the Passport Regulations, petitioner filed a petition of appeal with the Board of Passport Appeals of the Department of State (R. 7, 44-46). In response to a request for particulars, filed by petitioner, pursuant to the Board's rules, to enable him to prepare his case (R. 45-47), the Board responded that it was barred by regulation from disclosing most of the information requested (R. 48) and advised only that the State Department's file (R. 49):

> ". . . contains information indicating that . . . [petitioner] was present at 65 Morton Street, New York City in the summer of 1949 (July or August) and at Apartment 61, 65 Morton Street, New York City, during the month of January 1950. The . . . [petitioner's] relationship, if any, (past or present), with the following-named persons is considered pertinent to the Board's review and consideration of the case: Marcel Scherer, Rose Segure, Sandra Collins, Frank Collins, Bernard Peters, Kurt Fritz, Karl Sitte, Louis S. Weiss, Alfred Sarant, and William Perl."

Hearings were subsequently held, before a panel of the Board, at which testimony of petitioner and witnesses called by him and by the State Department [3] was adduced

[3] The testimony of the Department's witnesses (R. 171-270) was limited to a single aspect of the charges against petitioner: that he was present in the New York apartment building (R. 54).

and documentary evidence received (R. 58-270). At the commencement of these hearings, despite petitioner's protests, the Board announced that, in reaching its determination, it would consider "a confidential file composed of investigative reports from Government agencies", which it refused to disclose to petitioner (R. 66; see R. 60-69, 165-166).

No report or recommendation of the Board of Passport Appeals was at any time furnished to petitioner; nor was he accorded an opportunity to present his case to the Secretary. On September 7, 1955, the Acting Secretary of State advised him that the Board had submitted its recommendation to the Secretary and that, after "a review of the entire record and on the basis of all the evidence, including that contained in confidential reports of investigation", the Secretary had denied petitioner's passport application "under Section 51.135 of the passport regulations" (R. 4-5).

Petitioner thereupon filed a complaint in the District Court for the District of Columbia against the Secretary, requesting (1) a judgment declaring that petitioner was entitled to a passport and that the Passport Regulations are unlawful, and (2) an injunction enjoining the Secretary from continuing to deny petitioner a passport and directing the Secretary forthwith to issue one to him (R. 1-5). The Secretary's answer did not deny the essential facts alleged in the complaint (R. 49-51). On cross-motions for summary judgment and supporting affidavits (R. 5-48; R. 51-56), the District Court entered summary judgment for the Secretary (R. 56-57). Petitioner thereupon appealed to the Court of Appeals (R. 57), which reversed the judgment of the District Court and directed remand of the case to the Secretary for reconsideration in accordance with the rules previously enunciated in the Court of Appeals' decision in *Boudin* v. *Dulles*, 235 F.2d 532. *Dayton* v. *Dulles*, 237 F.2d 43.

On October 4, 1956, without further hearing, the Secretary signed a document designated "Decision and Findings" (R. 275-278), denying petitioner's passport application "under Section 51.135(c) of the Passport Regulations . . . and because the issuance of a passport would be contrary to the national interest" (R. 278). In this document, the Secretary set forth four findings based on evidence in the open record and, in connection with each, referred to related confidential information allegedly in State Department files, as follows (R. 276-277):

> 1a. On the basis of the open record: Petitioner was active in the Science for Victory Committee while at the University of California during 1943-1944, serving as chairman during much of that period. As chairman, he associated with Frank and Sandra Collins and Rose Segure, who had been instrumental in organizing the Committee.
>
> b. Confidential information in the State Department files "indicates" that the Committee "was conceived and organized by Communist Party officials as a front for propaganda and espionage activities; and that Frank and Sandra Collins and Rose Segure were members of the Communist Party at the time of their association" with petitioner and the Committee.
>
> [The Secretary did not find or suggest that petitioner had any knowledge of the Communist origin, if such there was, of the Science for Victory Committee or of the Communist Party membership of the three persons named. To the contrary, petitioner's undisputed testimony was that, to his knowledge, the Committee had no relationship whatever with the Communist Party (R. 82-83) and that none of the persons named or any others active in the organization were Communist Party members (R. 79-81, 92-93).]
>
> 2a. On the basis of the open record: During the period 1946-1950, at Ithaca, New York, petitioner maintained a close association and relationship with Alfred Sarant. At petitioner's invitation, Sarant and his wife lived in petitioner's house for a period of eight months in 1947-48, pending completion of the

Sarant home next door; and, thereafter, petitioner and Sarant were neighbors until July, 1950. In July, 1950, Sarant became the subject of intensive interrogation by the F.B.I. About a week thereafter, Sarant left Ithaca and subsequently entered Mexico with petitioner's then wife.

b. Confidential information in State Department files "establishes" that Sarant "was an active member of the Communist Party; that he admitted said membership during the years 1943 and 1944; and that he was involved in the espionage apparatus of Julius Rosenberg."

[Again, the Secretary neither found nor suggested that petitioner had any knowledge of Sarant's membership in the Communist Party or involvement with Rosenberg. To the contrary, petitioner's undisputed testimony was that he never knew Sarant to be engaged in Communist or espionage activities. (R. 154-155).]

3a. On the basis of the open record: Petitioner was present "during 1949 and 1950, on more than one occasion, in the apartment building at 65 Morton Street, New York City, in which Alfred Sarant was lessee of apartment 6-I".

b. Confidential information in State Department files "indicates" that Sarant's New York City apartment "was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power."

[Petitioner repeatedly and consistently denied—to F.B.I. agents, in affidavits filed with the Government, and in sworn testimony before grand juries and in the State Department—that he had ever set foot in the Morton Street apartment building (except on one occasion, in June, 1951, when he had accompanied F.B.I. agents, at their request, to that address) (R. 32, 103, 133-134, 269-270). The Secretary did not find or suggest that petitioner had any knowledge of the uses to which the Sarant apartment in that building was allegedly put.]

4a. On the basis of the open record: Since 1938, petitioner has maintained a close association and relationship with Bernard Peters, who was responsible

for petitioner's offer of employment at the Tata Institute in Bombay, where petitioner desires to work in close collaboration with Peters.

b. Confidential information in State Department files "indicates" that Peters "has held membership in the Communist Party outside the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent."

[The Secretary neither found nor suggested that petitioner knew of Dr. Peters' membership in the Communist Party or Communist activities, if such there were. To the contrary, petitioner's testimony was that, based on their long and close friendship, he was convinced that Dr. Peters was not a Communist (R. 16, 80, 150, 151).]

From the foregoing findings, "together with the confidential information relating thereto, *as well as other confidential information contained in the files of the Department of State* . . .", the Secretary concluded that he had "reason to believe, on the balance of all the evidence, that . . . [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and that "the issuance of a passport would be contrary to the national interest" (R. 278; emphasis supplied). The Secretary stated that the confidential information germane to the four enumerated findings "related to the internal security of the United States" and that disclosure of its sources and details would "be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of this Department and the Executive Branch to obtain reliable information affecting our internal security . . . [and] would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area" *(ibid.)*. Disclosure of the other confidential information relied on, the Sec-

retary said, "might . . . prejudice the interest of United States foreign relations" *(ibid.)*.

On resubmission of the case to the District Court, again on cross-motions for summary judgment (R. 274-279; R. 280), that court again granted summary judgment for the Secretary (R. 289-290; for District Court's opinion, see R. 280-289; *Dayton* v. *Dulles*, 146 F.Supp. 876). On appeal, a division of the Court of Appeals, Judge Fahy dissenting, affirmed the summary judgment of the District Court (R. 303).

This Court granted certiorari (R. 304).

SUMMARY OF ARGUMENT

I.

Although the Constitution contains no express provision on the right of travel, there can be no question that freedom of movement is a fundamental attribute of personal liberty constitutionally protected against arbitrary Government restraint. Some fifty years ago, this principle was affirmed as to interstate travel in *Williams* v. *Fears*, 179 U.S. 270; and it has recently been consistently extended by the court below to travel abroad. Both history and policy considerations support this affirmation.

Since a passport by law is now a prerequisite to foreign travel (8 U.S.C. 1185; Presidential Proc. 3004, 67 Stat. c31), its denial is equivalent to denial of the right to travel abroad. *Shachtman* v. *Dulles*, 225 F.2d 938 (C.A.D.C.).

II.

The Secretary's decision of passport denial here was based in vital part on undisclosed information, neither the substance, details or sources of which have ever been disclosed to petitioner or to the courts. Thus, petitioner

has been deprived of the constitutional safeguard of a fair hearing. Such reliance on secret information violates due process.

There is no authority for governmental deprivation of personal liberties by resort to secret information. Those cases cited by the lower courts in which the use of such data has been sustained involved administrative determinations on issues of legislative facts; in our case, on the other hand, the Secretary has decided issues of adjudicative facts. Where individualized fact-finding and classification are involved, due process precludes reliance on undisclosed information.

Parker v. *Lester*, 227 F.2d 708 (C.A. 9) holds as much and is in direct conflict with the ruling below. *Parker* dealt with what, in effect, are seamen's passports. Despite the Government's appeal to security considerations, the court there struck down the Coast Guard screening regulations in issue because they permitted use of secret data to determine the eligibility of seamen for such passports.

A passport may be denied only after a due process hearing. Such a hearing contemplates, as a minimum, the rights of confrontation and cross-examination. A proceeding such as this one is tantamount to a criminal prosecution and, furthermore, stigmatizes the citizen-applicant as one disloyal to his Government. Consequently, his liberty and property are affected. The American mores dictate that no person be stigmatized, accused, and shorn of his liberty on undisclosed information and the *ipse dixit* of a Federal officer.

The appeal of the Secretary to security considerations, commonplace in loyalty and security proceedings, is neither unique to our time nor is it persuasive. The guarantees embodied in our Bill of Rights were designed to protect the individual against the same "reasons of

state". Moreover, there is no suggestion that the Secretary be compelled to reveal his secret files; disclosure is required only when he resorts to such files to deny an applicant his passport.

The balance of the conflicting interests involved on this issue is strongly in favor of disclosure. Whereas the injury to petitioner is severe, the prejudice which the Government foresees from disclosure is fanciful. The source of the information employed by the State Department in passport administration is that same vast melange of unreliable data that has been widely employed in Government employee security-risk programs. That the Department itself lacks confidence in the integrity of such information is evidenced by the history of several recent notorious cases and the instant case as well. Indeed, the Secretary has admitted that he himself at times does not know the identity and so cannot judge the veracity of his informants. Thus, he abdicates judgment to the F.B.I. and the other agencies from which he derives his anonymous information.

The war power does not support so radical a departure from traditional due process. The present emergency is not the equivalent of a shooting war. And Congress has never approved the standards or procedures for passport denial which the Secretary here applies.

III.

Although no statute expressly provides that passport adjudications by the Secretary "be determined on the record after opportunity for an agency hearing", 5 U.S.C. 1004, the Constitution requires a fair hearing before a passport may be denied. Accordingly, under the doctrine of *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, the formal requirements of the Administrative Procedure Act would appear to control. Nor is passport issuance a "foreign affairs function" excepted from the Act.

It is incontrovertible that, in several significant respects, the State Department proceeding here did not comply with the requirements of Administrative Procedure Act.

IV.

Even if we accept all the "facts" which the Secretary recites as true, and his conclusions as reasonable; the criteria on which he posits the passport denial here are so vague that they cannot satisfy due process requirements. The first standard, "advancement of the Communist movement", is no more meaningful than the epithets condemned in *Watkins* v. *United States*, 354 U.S. 178, and in other decisions of this and other courts. The second standard, "the national interest", is at least equally amorphous. In truth, this is no standard at all, but merely a cloak for the Secretary's claim of absolute discretion. Both these grounds, on which the Secretary bars petitioner from a passport, lack the reasonable certainty of due process criteria.

V.

The denial of a passport to petitioner violates due process because there is no rational basis for the Secretary's conclusions. We consider the four findings made from the open record and the undisclosed information deemed germane thereto; we assume their truth and accuracy. Nevertheless, they can afford no conceivably rational basis for the Secretary's conclusions. However ingeniously the Secretary may weave a "pattern of association" from (1) petitioner's brief affiliation with the Science for Victory Committee in 1943-1944, (2) an association with Sarant, from 1946 to 1950, (3) presence in a New York apartment building "on more than one occasion", in 1949 and 1950; and (4) friendship with Dr. Bernard Peters since 1938; such a "pattern of association", all quite innocent so far as petitioner was concerned,

cannot rationally lead to the conclusion that, in 1956, years later, petitioner's proposed trip to India was designed "to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully, of advancing that movement" and would be contrary to "the national interest".

The Secretary's findings assume relevance only insofar as they reflect a judgment of petitioner's guilt by association. Patently, that is what the Secretary's decision amounts to. Under our Constitution, such an official finding of vicarious guilt is impermissible and blatantly violates this Court's strictures with respect to the need for *scienter*.

VI.

The Secretary's decision of passport denial impairs petitioner's First Amendment rights. Petitioner is barred from travel solely by reason of his associations with others. The right to indulge in such associations, however, is protected from Government restraint by the First Amendment. Beyond this, the Secretary's action effects a prior restraint on all citizens, who must limit their freedom of association lest their right of travel be withdrawn. There is no showing of such danger of evil from petitioner's travel abroad as to warrant abridgements on First Amendment freedoms.

Furthermore, to apply the Passport Regulations as they have here been applied, is to do violence to the principles of fairness implicit in the inhibitions against bills of attainder and retroactive penal legislation embodied in Article I, section 9 of the Constitution. As in *Ex parte Garland*, 71 U.S. 333; and *Cummings* v. *Missouri*, 71 U.S. 277, the basis for depriving petitioner of a fundamental liberty is his past associations, and there is nothing he can do which would change the result.

VII.

The Secretary had no authority to issue the Passport Regulations, under which a passport was denied to petitioner in this case. On this Point, we adopt and respectfully refer the Court to Point II of the Argument in the Brief for Petitioners in *Kent and Briehl* v. *Dulles*, No. 481, this Term. A summary of the argument on this Point appears *infra*, pp. 66 *seq.*

ARGUMENT

I.

Petitioner's Right to Travel Abroad and Thus to a Passport, which is Presently Necessary for Such Travel, is Protected by the Constitution.

A. *Freedom to travel abroad is protected by the Constitution.*

Although the Constitution contains no express guarantee of the right of travel, either within the United States or abroad, there can be no question that such freedom of movement is a fundamental attribute of personal liberty which the Founders deemed constitutionally protected against arbitrary Government restraint.

At the turn of the century, speaking of travel among the States, this Court said, in *Williams* v. *Fears*, 179 U.S. 270, 274:

> "Undoubtedly the right of locomotion, the right to remove from one place to another according to inclination, is an attribute of personal liberty . . ."

Some fifty years later, in *Shachtman* v. *Dulles*, 225 F.2d 938, the Court of Appeals for the District of Columbia Circuit accorded the same rank to travel abroad, saying (at 941):

> "The right to travel, to go from place to place as the means of transportation permit, is a natural right

> subject to the rights of others and to reasonable regulation under law. A restraint imposed by the Government of the United States upon this liberty, therefore, must conform with the provision of the Fifth Amendment that 'No person shall be . . . deprived of . . . liberty . . . without due process of law.'"

Previously, a three-judge statutory court, in *Bauer* v. *Acheson*, 106 F.Supp. 445, 451 (D.D.C.) had reached the same conclusion. The right has since been consistently reaffirmed. *Boudin* v. *Dulles*, 235 F.2d 532; *Kraus* v. *Dulles*, 235 F.2d 840; *Dayton* v. *Dulles*, 237 F.2d 43; *Briehl* v. *Dulles*, 248 F.2d 561; *Stewart* v. *Dulles*, 248 F.2d 602; and see the opinion in the instant case, at R. 298. Both history and policy considerations support this affirmation.

The right of free movement is deeply rooted in Anglo-Saxon law. Demands for its guarantee were reflected as far back as the original (1215) Magna Carta, which granted every free man the right to leave the realm at his pleasure in time of peace; and it had become an established right in the common law by the seventeenth century. Note, *Passports and Freedom of Travel: The Conflict of a Right and a Privilege*, 41 Georgetown L.J. 63, 64-70 (1952); Parker, *The Right to Go Abroad: To Have and to Hold a Passport*, 40 Virginia L.R. 853, 866-868 (1954); Comment, *Passport Refusals for Political Reasons: Constitutional Issues and Judicial Review*, 61 Yale L.J. 171, 190 (1952); Boudin, *The Constitutional Right to Travel*, 56 Columbia L.R. 46 (1956).

The right to travel was, of course, essential to the settlement of the American colonies, established by emigrants; and it early found expression in colonial charters, the Massachusetts Body of Liberties, the Constitution of the State of Pennsylvania and the Articles of Confederation. Chafee, *Three Human Rights in the Constitution* (1956), 171-175, 178, 184.

The importance of travel abroad to a free, democratic society hardly needs to be demonstrated. One's very liveli-

hood may depend upon it. See, e.g. *Boudin* v. *Dulles*, *supra*, 235 F.2d at 535, n.3; *Bauer* v. *Acheson*, *supra*, 106 F.Supp. at 451. Interdependence of the right to work and freedom of movement was noted in *Allgeyer* v. *Louisiana*, 165 U.S. 578, 589, where this Court stated that the term "liberty" in the Fourteenth Amendment includes

> ". . . the right of the citizen to be free in the enjoyment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; [and] to earn his livelihood by any lawful calling . . ."

Cf. *Crandall* v. *Nevada*, 73 U.S. 35, 44, and the concurring opinion of Mr. Justice Douglas in *Edwards* v. *California*, 314 U.S. 160, 180-181.

Affording, as it does, opportunities for the exchange of ideas and experiences, freedom of travel has been assimilated to the rights expressly guaranteed by the First Amendment: "In all these liberties the principal element is the stretching of the mind to accomodate the growing spirit". Wyzanski, *Freedom to Travel*, Atlantic Monthly, October 1952, p. 66. This is emphasized by the ever-growing need in our day, if knowledge is to be advanced, for the interchange of ideas among the world's scholars and scientists.[4] Particularly pertinent is President Eisenhower's statement, four years ago, underscoring the urgency for sending our teachers and students abroad (New York Times, June 1, 1954, p. 18):

> ". . . there is no time to waste if truth is to win the war for the minds of men! Here is the unend-

[4] See testimony of Dr. Geoffrey F. Chew, of Federation of American Scientists, Hearings (Security and Constitutional Rights), Subcommittee on Constitutional Rights, Senate Committee on the Judiciary, 84th Cong., 2d sess., pursuant to S. Res. 94, Nov. 14, etc., 1955, pp. 86-103, *passim;* see, also, testimony of Dr. Warren Weaver, member of National Science Board and vice-president of Rockefeller Foundation, before a Congressional Committee, reported in Washington Post and Times Herald, Jan. 23, 1958, p. A12.

ing mission of the university—indeed of every educational institution of the free world—to find and spread the truth!

"We send professors, scholars and students out to the schools of the free world, to promote understanding of us even as they grow in knowledge and understanding of others. This practice must be accelerated.

Foreign travel is equally important in the struggle for understanding and peace among nations. See Address of President Eisenhower, *The Geneva Conference of Heads of Government* (1955) 63; and letter of President Truman to Nikolai M. Shvernik, president of Soviet Presidium, quoted in Comment, 61 Yale L.J., *supra*, 202, n. 191 (". . . We shall never be able to remove suspicion and fear as potential causes of war until communication is permitted to flow, free and open, across international boundaries").

Certainly not less important for a vital democracy is the opportunity such travel affords its citizens to attain first hand familiarity with the operation of their Government's policies abroad. Thus, we become better qualified constructively to criticize and to shape those policies. "Citizens should not be required to make up their minds on these matters merely on the basis of what they are told by the government or a few foreign correspondents. The right of individuals to go abroad and to gain their own impressions of people and events in other countries is a matter of importance to them as citizens and to a government which draws all its powers from their votes." Comment, 61 Yale L.J., *supra*, 191; see Chafee, *op. cit. supra*, 196.

These are among the cogent considerations which make the right to travel abroad indispensable to a free society. It is most significant that "freedom of mobility and political power in the hands of the people have generally appeared at the same time . . . [and that] one of the first acts of any dictatorship or police state is to repress the

free movement of the population" (Vestal, *Freedom of Movement*, 41 Iowa L.R. 6, 13 (1955); cf. Comment, 61 Yale L.J., *supra*, 202); and that freedom of movement has found expression in the Universal Declaration of Human Rights and many modern constitutions.[5]

B. *A passport is presently a prerequisite to travel abroad.*

Prior to World War II, a passport was not necessary for travel abroad in time of peace.[6] Now, however, by

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[5] Article 13 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations in 1948, provides (United Nations Department of Public Information, Universal Declaration of Human Rights (1949), S.Doc. 123, 81st Cong., 1st Sess., 1156):

"(1) Everyone has the right to freedom of movement and residence within the borders of each State.

(2) Everyone has the right to leave any country, including his own, and to return to his country."

The right of free movement has expressly been embodied in the constitutions of the following nations: Argentina, Mar. 16, 1949, Art. 26, 1 Peaslee, *Constitutions of Nations* (The Netherlands, 2d ed., 1956) 50; Bolivia, Nov. 23, 1945, Art. 6, *Id.* 179; Chile, Sept. 18, 1925, Art. 10(15), *Id.* 485; China, Dec. 25, 1947, Art. 10, *Id.* 516; Costa Rica, Nov. 8, 1949, Art. 22, *Id.* 578; Cuba, July 5, 1940, Art. 30, *Id.* 616; Ecuador, Dec. 31, 1946, Art. 187 (5), *Id.* 805; El Salvador, Sept. 8, 1950, Art. 154, *Id.* 839; Guatemala, Aug. 10, 1954, Art. 15(b), 2 Peaslee, etc., 121; Honduras, Mar. 28, 1936, Art. 67, *Id.* 163; Indonesia, Aug. 15, 1950, Art. 9, *Id.* 373; Italy, Jan. 1, 1948, Art. 16, *Id.* 484; Japan, Nov. 3, 1946, Art. 22, *Id.* 514; Mexico, Jan. 31, 1917, Art. 11, *Id.* 664; Nicaragua, Nov. 1, 1950, Art. 60, 3 Peaslee, etc., 10; Peru, Apr. 9, 1933, Art. 67, *Id.* 140; Turkey, Jan. 10, 1945, Arts. 70, 78, *Id.* 410, 411; Uruguay, Oct. 26, 1951, Art. 37, *Id.* 615; Venezuela, Apr. 11, 1953, Art. 35(5), *Id.* 708.

Various treaties of friendship, commerce and navigation to which the United States is a party similarly assure that nationals of each signatory "shall be permitted to enter the territories of the other . . . and shall be permitted freely to reside and travel therein". See, e.g., Treaty between the United States and the Italian Republic, Feb. 2, 1948, Art. I, § 1, 63 Stat. 2256; Vestal, 41 Iowa L.J., *supra*, 25, n. 61.

[6] For the civil war, see Dep't of State, The American Passport (1898) 49 ff. As to World War I, see 40 Stat. 559 (1918), and Procl. No. 1473, 40 Stat. 1829 (1918).

reason of section 215 of the Immigration and Nationality Act of 1952 and an implementing Presidential proclamation, it is unlawful for petitioner or any other citizen "to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport" (8 U.S.C. 1185(b))[7]

Thus, what was at one time "a desirable incident to travel, not a necessity" has become and is presently "a document which is essential to lawful departure of an American citizen" and without which entry into most foreign countries is impossible. *Shachtman* v. *Dulles*, *supra*, 225 F.2d at 940, 941; see *Bauer* v. *Acheson*, *supra*, 106 F. Supp. at 451; Comment, 61 Yale L.J., *supra*, 171, n. 3, and 172.

In short, denial of a passport is today equivalent to denial of the right to travel abroad. It is in the light of these considerations that we proceed to an examination of the Secretary's passport denial in the instant case.

II.

The Secretary's Reliance On Secret Information In Denying A Passport To Petitioner Violates Due Process.

The Secretary's denial of a passport to petitioner is based in vital part on information allegedly in State Department files which the Secretary has refused to disclose either to petitioner or to the courts. Each of the Secretary's four findings from the open record is accompanied by his recital that there is related "[c]onfidential information contained in the files of the Department of State, constituting a part of the record considered by the Passport Office, the Board of Passport Appeals" and

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[7] The pertinent provisions of section 215 are reproduced in the Appendix, *infra*, pp. 72-73. The implementing Presidential proclamation is Proclamation 3004, 37 Stat. c 31. The pertinent regulations are set forth in the Appendix, *infra*, pp. 84-86.

the Secretary (R. 276-277). As the District Court observed, the "full significance of the findings . . . can be determined only by reference" to the accompanying recitals of the undisclosed information (R. 286-287). In addition, the Secretary has acted on the basis of other undisclosed information presumably unrelated to these four findings (R. 278). Resort to secret information thus taints this entire proceeding.

The Secretary says that the undisclosed information germane to the four findings "relates to the internal security of the United States", and that, in his judgment, disclosure of its sources and details "would . . . be detrimental to our national interest by compromising investigative sources and methods and seriously interfering with the ability of . . . [the State] Department and the Executive Branch to obtain reliable information affecting our internal security" and "would have an adverse effect upon our ability to obtain and utilize information from sources abroad and interfere with our established relationships in the security and intelligence area" (R. 278). Disclosure of the other secret information, unrelated to the four findings, "might . . . prejudice the interest of United States foreign relations" (*ibid.*).

The Court below erroneously assumed that the substance of the confidential information had been disclosed to petitioner (R. 298). This is by no means so. All the Secretary has told us are what, in his view, the confidential information "indicates" (with respect to Findings I, III, and IV) or "establishes" (with respect to Finding II) (R. 276-277). In no instance have we been given the substance, details, or sources of such information. Moreover, with respect to Finding V (R. 275), equally essential to the decision of passport denial, the Secretary has furnished not even a hint of what the undisclosed information may concern. Not the slightest indication appears anywhere in the record.

It has been urged below that the secret information deals with petitioner's associates and not with himself, and that, consequently, its revelation would make no difference to petitioner's case (Br. for Appellee, Appeal No. 13,717, p. 42). The short answer to this contention is that if petitioner has been deprived of the right to a fair hearing, "he need not specify the precise manner in which he would have used this right—and how such use would have aided his cause—in order to complain of the deprivation". *Simmons* v. *United States*, 348 U.S. 397, 406. Moreover, the use of the undisclosed information has impaired petitioner's liberty, not his associates'; it is therefore little solace to be told that the information does not concern him.

Absent knowledge of details and sources, how can it be assumed that disclosure will be unavailing? Revelation may show that a good portion of the information does not even exist or that it is patently incredible. An objective analysis may demonstrate that the inferences drawn by the Secretary from the information are unjustified: after all, "Communist activities", "involvement in espionage", or "Communist propaganda" are but subjective symbols, which, to a more careful and impartial observer, may appear unfounded. Disclosure may demonstrate that the activities of petitioner's associates, however they may be characterized, occurred at times far remote from when petitioner associated with them.

Thus, if, in fact, the Science for Victory Committee "was conceived and organized by Communist officials for propaganda and espionage activities" (R. 276), such designs, it may be revealed, early proved abortive and were abandoned prior to petitioner's association with the organization. If, in fact, the Collinses and Rose Segure were at any time "members of the Communist Party" (*ibid.*), revealment may prove that their membership antedated petitioner's association with them. If, in fact, Sarant "was an active member of the Communist Party

. . . [and] involved in the espionage apparatus of Julius Rosenberg" (R. 277), disclosure may reveal that such membership and involvement long predated petitioner's first meeting with Sarant, in the fall of 1946. If, in fact, Sarant's New York City apartment "was used by Julius Rosenberg and other members of the spy ring" (*ibid.*), disclosure may demonstrate that that apartment was so used long before petitioner met Sarant and learned that there was such an apartment. Indeed, on confrontation with and cross-examination of the confidential informants, even their characterizations of petitioner's associates, if characterizations there were, may prove unfounded.

The majority below note that this Court has never passed upon the precise question whether reliance on secret information to deny a citizen's right to travel comports with due process and that they share with Americans the resentment and opposition to such procedure (R. 295, 299). Nevertheless, they feel compelled to sanction so radical a course because of the "necessitous circumstances of public concern" and because the "cases and common sense hold that the courts cannot compel the Secretary to disclose information garnered by him in confidence in this area." (R. 299, 300). We address ourselves to these considerations.

A. *The cases relied on by the court below.*

We consider first the cases to which the court below refers: *United States* v. *Curtiss-Wright Corp.*, 299 U.S. 304; and *Chicago & Southern Air Lines* v. *Waterman Corp.*, 333 U.S. 103; and the others cited by the District Court: *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294; and *Williams* v. *New York*, 337 U.S. 241. Certainly, these decisions are no authority for the ruling below.

Not only, as the court recognizes, do these several cases (*Williams* excepted) involve "commerce, more readily subject to regulation, or deprivation, than are the inherent rights of individuals" (R. 298). They are further "distinguishable . . . because they do not involve indi-

vidualized fact finding and classification, but legislative determinations, political judgments, and the exercise of judicial discretion in the imposition of sentence." *Gonzales* v. *United States*, 348 U.S. 407, 412, n. 4. Moreover, *Curtiss-Wright Corp.* and *Waterman Corp.* both concern the Executive's exercise of its foreign affairs functions; and, as the court below observes: "The issuance of a passport is not the conduct of foreign affairs" (R. 300).

In *Curtiss-Wright Corp.*, a Congressional joint resolution implemented by a Presidential proclamation, embargoing munitions shipments to Bolivia, was sustained against an attack for invalid delegation of legislative power, the Court saying (299 U.S. at 315):

> "Whether if the Joint Resolution had related solely to internal affairs it would be open to challenge. . . . we find it unnecessary to determine. The whole aim of the resolution is to affect a situation entirely external to the United States, and falling within the category of foreign affairs. . ."

What was there delegated to the President was the power to lay down *general* rules in the field of foreign affairs; and in such circumstances, and "especially . . . in time of war" (at 320), the Court recognized that the President "has his confidential sources of information", that secrecy with respect to such information "may be highly necessary, and the premature disclosure of it productive of harmful results" (*ibid.*).

Waterman Corp. held an order of the Civil Aeronautics Board authorizing an American air carrier to engage in foreign air transportation immune from judicial review either before or after approval by the President; on the ground that, before approval, the order had no force and effect and that, after approval, it constituted a political matter. The Court noted that such orders "embody Presidential discretion as to political matters beyond the com-

petence of the courts to adjudicate" (333 U.S. at 114): and, further, that (at 111):

> " . . . Such decisions are wholly confided by our Constitution to the political departments of the government, Executive and Legislative. They are delicate, complex, and involve large elements of prophecy . . . They are decisions of a kind for which the judiciary has neither aptitude, facilities nor responsibility and which has long been held to belong in the domain of political power not subject to judicial intrusion or inquiry . . ."

Norwegian Nitrogen Co. held a statutory requirement of "hearing" satisfied even though the Tariff Commission relied on an American company's cost of production without revealing those costs to a Norwegian competitor company. The Court pointed out that the "process of tariff-making by Congress and congressional committees is not different in essentials from that for legislation generally . . . The hearing is not one that may be demanded as of right . . ." (288 U.S. at 304); and that "[w]hat is done by the Tariff Commission and the President in changing the tariff rates to conform to new conditions is in substance a delegation, though a permissible one, of the legislative process . . ." (at 305). The Court explicitly distinguished that order from "the kind of order that emerges from a hearing before a body with power to ordain [which] is one that impinges upon legal rights in a very different way from the report of a Commission which merely investigates and advises" (at 318).

In *Williams*, the Court held the defendant and his counsel not entitled to confront and cross-examine persons from whom a trial judge obtained information before he imposed a sentence of execution after the jury had recommended life imprisonment. Although due process requires "that no person shall be tried and convicted of an offense unless he is given reasonable notice of the charges against him and is afforded an opportunity to examine adverse

witnesses", long established historical practice with respect to the sentencing function, sound practical reasons, and the salutary modern concepts for individualization of punishment require that a sentencing judge be permitted broad discretion and access to a wide variety of information (337 U.S. at 245-251).

Reliance on such decisions to justify resort to confidential information in a case such as ours betrays an all too frequent confusion between adjudicative and legislative fact finding. "The conclusion seems rather fully supported that a party who has a sufficient interest or right at stake in a determination of governmental action should ordinarily have an opportunity for a trial type of hearing on issues of adjudicative facts, but that such a hearing ordinarily is not required on issues of legislative facts". Davis, *The Requirement of a Trial Type Hearing*, 70 Harv. L.Rev. 193, 212 (1956).*

We are not here dealing with the use of secret information in the promulgation of regulations of general application, a function which might well be assimilated to the legislative process. We need not consider whether a general bar to travel to India (as that recently imposed for travel to the mid-East) might conceivably be immune from judicial scrutiny. There is no such general proscription here. Far from it. The Secretary has concluded that this *one individual*, petitioner, is going abroad to engage in activities which will advance the Communist movement for the purpose, wilfully and knowingly, of advancing that movement. He has barred petitioner *alone*, in "the national interest", from travel abroad. Other research

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* ". . . Adjudicative facts are facts about the parties and their activities, businesses, and properties, usually answering the questions of who did what, where, when, how, why, with what motive or intent . . . Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law, policy, and discretion." Davis, *op. cit.*, 199.

physicists presumably remain free to accept employment at and to go to the Tata Institute, there to work with Dr. Peters and his colleagues. Only this one passport applicant is prohibited from doing so. And solely because the Secretary has made findings concerning petitioner *himself*, characterizing and stigmatizing *him alone* as an individual bent on Communist activity abroad.

B. *The conflict with Parker v. Lester, 227 F.2d 708 (C.A. 9).*

The several cases cited by the lower courts are thus quite different from the case at bar. And the Court of Appeals for the Ninth Circuit recognized the distinction when it invalidated the security regulations of the Coast Guard in *Parker* v. *Lester*, 227 F.2d 708, a decision clearly in conflict with the ruling below.[9]

Parker involved the procedural rights of seamen applying for the specially validated merchant mariners' documents which Coast Guard security regulations today require for seamen's employment on vessels. That these documents in effect are seamen's passports is evident from the State Department's regulation which exempts a seaman travelling abroad from the passport requirement if he possesses a "speciallly validated United States merchant mariner's document issued by the Coast Guard". 22 CFR 53.3(c), as amended; republished 22 F.R. 10836 (Dec. 27, 1957). Thus, the *Parker* case and the instant suit are counterparts.

Despite the Government's insistence that security considerations preclude revealment of the secret information relied on, the Ninth Circuit Court of Appeals struck down the Coast Guard regulations because they permitted reliance by the Coast Guard on data concealed from the seamen affected, thus denying them the right of cross-

[9] Although *Parker* was argued to the court below, its opinion surprisingly makes no reference to the case.

examination; and because they contemplated decisions denying a particular seaman his merchant mariner's document on a record containing "facts" unknown to him and thus beyond his power to refute. The court held that the "system of secret informers, whisperers and tale-bearers [is not] of such vital importance to the public welfare that it must be preserved at the cost of denying to the citizen even a modicum of the protection traditionally associated with due process". *Parker* v. *Lester*, *supra*, 227 F.2d at 719.[10] See, also, *Boudin v. Dulles*, 136 F.Supp. 218 (D.D.C.), mod. and aff'd. 235 F.2d 532 (C.A. D.C.).[11]

C. *The due process requirement of a fair hearing.*

As the court below has consistently held, the right to travel abroad and to the passport requisite to such travel is protected by the constitutional guarantee of "liberty" and may be fettered, if at all, only after a due process hearing (Point I). "When the Constitution requires a

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[10] The Government did not petition for certiorari in the *Parker* case. It apparently has accepted the decision of the Court of Appeals; for the Coast Guard has revised its regulations to comport with the court's ruling and has granted clearance documents to the affected seamen.

[11] The District Court's decision in the *Boudin* case held invalid section 51.170 of the Passport Regulations here in issue, which section permits the Board of Passport Appeals to consider confidential information. Judge Youngdahl said, in part (at 222): ". . . The right to a quasi-judicial hearing must mean more than the right to permit an applicant to testify and present evidence. It must include the right to know that the decision will be reached upon evidence of which he is aware and can refute directly. See *Dulles* v. *Nathan*, . . . 225 F. 2d 29, 30-31 . . . When the basis of action by any branch of the government remains hidden from scrutiny and beyond practical review, the seeds of arbitrary and irresponsible government are sown. More and more the courts have become aware of the irreparable damage which may be, has been, and is, wrought by the secret informer and faceless tale-bearer whose identity and testimony remains locked in confidential files . . ."

hearing", however, "it requires a fair one . . ." *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, 50. And confrontation and cross-examination are essential ingredients of a fair hearing (*In re Oliver*, 333 U.S. 257, 273; emphasis supplied):

> " . . . A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and *these rights include, as a minimum, a right to examine the witnesses against him*, to offer testimony, and to be represented by counsel . . ."

It is constitutional principle and simple logic that

> " . . . manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute . . ." (*I.C.C.* v. *Louisville & Nashville R. Co.*, 227 U.S. 88, 93)

See, also, *Roviaro* v. *United States*, 353 U.S. 53; *Jencks* v. *United States*, 353 U.S. 657; *United States* v. *Andolschek*, 142 F.2d 503 (C.A. 2, per L. Hand, J.), quoted with approval in *Jencks*, *supra*; *United States* v. *Coplon*, 185 F. 2d 629 (C.A. 2, per L. Hand, J.), cited with approval in *Roviaro*, *supra*; *United States* v. *Krulewitch*, 145 F.2d 76 (C.A. 2); cf. *Remmer* v. *United States*, 347 U.S. 227.

We are mindful that this principle finds most frequent application in criminal proceedings, where the Sixth Amendment is explicit authority for the defendant's right "to be confronted with the witnesses against him". But even in deportation cases, an area of alien control, where the jurisdiction of the Executive has been characterized variously as "inherent in the executive power" (*United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 542), and "absolute and unqualified" (*Fong Yue Ting* v. *United States*, 149 U.S. 698, 707), due process has consistently been held to require confrontation and cross-examination. *Unger* v. *Seaman*, 4 F.2d 80, 82 (C.C.A. 8); *Maltez* v.

Nagle, 27 F.2d 835, 837 (C.C.A. 9); *Svarney* v. *United States*, 7 F.2d 515, 517-518 (C.C.A. 8); *Sardo* v. *McGrath*, 196 F.2d 20, 22 (C.A.D.C.); see *Wong Yang Sung* v. *McGrath*, *supra*, 339 U.S. at 50; cf. *Jay* v. *Boyd*, 351 U.S. 345.[12] And the invalidity of administrative action predicated on undisclosed "facts" has long been established. *Morgan* v. *United States*, 304 U.S. 1; *Ohio Bell Telephone Co.* v. *Public Utilities Commission*, 301 U.S. 292; *Bratton* v. *Chandler*, 260 U.S. 110; *Lloyd Sabaudo S.A.* v. *Elting*, 287 U.S. 329, 335-336, 339-340; *Goldsmith* v. *Board of Tax Appeals*, 270 U.S. 117, 123; *United States* v. *Abilene & S.R. Co.*, 265 U.S. 274, 288-289; *In re Carter*, 192 F.2d 15 (C.A.D.C.), cert. den. 342 U.S. 862; *Jordan* v. *American Eagle Ins. Co.*, 169 F.2d 281, 288 (C.A.D.C.), and cases cited.

A passport proceeding, in its effect on the passport applicant, is tantamount to a criminal prosecution. Petitioner, it is true, has not been charged with a statutory crime and put in peril of imprisonment. But he too is a person accused; he has been barred from enjoyment of rights accorded to his fellow citizens; he has been confined to the limits of his own country, though not to jail. In these days when one can journey to Europe more quickly than petitioner's colonial forbears could span the distance from Massachusetts to New York, such confinement constitutes a real and substantial abridgement of freedom. See *Walker* v. *Chief Quarantine Officer*, 69 F. Supp. 980 (D. Canal Zone).

Beyond this, a high Federal official has branded petitioner a person disloyal or intent on disloyalty to his

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[12] ". . . Although such aliens have been given a right to a discretionary determination on an application for suspension . . ., a grant thereof is manifestly not a matter of right under any circumstances, but rather is in all cases a matter of grace. Like probation or suspension of criminal sentence, it 'comes as an act of grace' . . ., and 'cannot be demanded as a right . . .'" 351 U.S. at 354.

Government. The "badge of infamy" which decisions such as this one pin on our citizens impairs "substantial rights affecting . . . [their] lives and property". *Peters* v. *Hobby*, 349 U.S. 331, 347; *Wieman* v. *Updegraff*, 344 U.S. 183, 191. Indeed, "in view of the stigma attached" by such rulings, "the need for procedural safeguards seems even greater than in other cases". *Cole* v. *Young*, 351 U.S. 536, 546. In such circumstances, to deny petitioner a passport on the basis of confidential information which he cannot see or answer is notoriously to disregard the "[p]rocedural fairness and regularity [which] are of the indispensable essence of liberty". *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 224 (Jackson, J. dissenting).

Procedural due process for this quasi-defendant[13] should mean nothing less than the Constitution explicitly accords the basest defendant in a criminal proceeding. The rights of confrontation and freedom from accusation and conviction *in camera* are among the fundamental safeguards in our jurisprudence. These rights were stressed in the English Bill of Rights and have found expression in all American constitutions from the beginnings of our history. Pound, *The Development of Constitutional Guarantees of Liberty* (1957) 84-85. They were essential elements even of "the ancient historic traditions of fair play". O'Brian, *National Security and Individual Freedom* (1955) 61-62.[14]

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[13] ". . . While the applicant for a passport who has been turned down on loyalty grounds is not a defendant, in the strict sense of the term, he is at least a quasi-defendant, and as such is legally entitled to at least a quasi-judicial hearing before he is finally stigmatized by a government department and denied a valuable right." Fellman, *The Defendant's Rights* (1958) 258.

[14] O'Brian recalls the report to King Agrippa respecting the apostle Paul: "It is not the manner of the Romans to deliver any man to die, before that he which is accused have the accusers face to face, and have license to answer for himself concerning

D. *The appeal to "common sense".*

The majority below invoke "common sense" in support of their holding (R. 300). We submit, however, that the American mores dictate rather that no person be stigmatized, accused, and shorn of his liberty on undisclosed information and the *ipse dixit* of a Federal officer.

President Eisenhower has epitomized the American code of conduct in this regard: " . . . In this country, if someone dislikes you, or accuses you, he must come up in front. He cannot hide behind the shadow. He cannot assassinate you or your character from behind, without suffering the penalties an outraged citizenry will impose." Statement of President Eisenhower, Nov. 23, 1953, quoted in *Jay* v. *Boyd, supra,* 351 U.S. at 373 (Frankfurter, J., dissenting). We assume that a public officer is subject to at least the same rules of fair dealing as is a private citizen.

Mr. Dean Acheson, who, as Secretary of State, promulgated the Passport Regulations, has since recognized that they reflect "a grave mistake and a failure to foresee consequences which were inevitable"; and he characterizes the practice of secret evidence and secret informers which the Regulations sanction, as "alien to our conception of justice and the rights of the citizen". Acheson, *A Democrat Looks at His Party* (1955) 127, 129. "Confrontation and cross-examination under oath are essential, if the American ideal of due process is to remain a vital force in our public life . . ." *Peters* v. *Hobby, supra,* 349 U.S. at 351 (Douglas, J., concurring).

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the crime laid against him". The Acts, 25:16. And Trajan's instructions to the younger Pliny as to treatment of a new sect known as Christians: "anonymous accusations must not be admitted in evidence as against anyone, as it is introducing a dangerous precedent, and out of accord with the spirit of our times." Private Letters, Pagan and Christian: An Anthology (London, 1929) 82.

E. *The appeal to security considerations.*

To justify suppression of the information on which he has acted, the Secretary advances considerations which have become commonplace in loyalty and security proceedings. Disclosure, he says, would compromise investigative sources and methods, interfere with the Executive's ability to obtain security and intelligence information internally and abroad, and possibly prejudice foreign relations (R. 278).

Such formulations are, of course, not unique to our time. The guarantees embodied in our Bill of Rights were established for the very purpose of protecting the individual "against the same 'reasons of state' which are being asserted today to justify secret evidence, anonymous accusers, secret hearings, and so on". O'Brian, *op. cit. supra*, 58, citing Holdsworth, *History of English Law*, IX (1926) 235.[15]

The question, moreover, as Judge Learned Hand observed in *United States* v. *Andolschek, supra*, is not whether the Government may be compelled to reveal the sources and details of its confidential information; it is, rather, whether, having utilized such information to deprive a citizen of his constitutional rights, the Government may still hold it secret. No one suggests that the Secretary be forced to open any of his files. But once

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[15] With respect to the appeal to security considerations, a recent statement of Mr. Adlai E. Stevenson is worthy of note:

> "The threat to freedom which I sense today is nothing very concrete. It is simply a vague widely held feeling that perhaps we must choose between freedom and survival, and that obviously the choice must be survival.
>
> "I say no such choice confronts us. I say the choice is among various national policies to insure national survival—and that as respects freedom we have no choice at all but to maintain it more vigilantly and vigorously than ever."
>
> (Speech in Chicago, Ill., Dec. 16, 1957, reported in Civil Liberties (ACLU), No. 157, Jan. 1958)

having dipped into those files to justify the passport denial to petitioner, we insist that he may no longer suppress them; the "government must choose; either it must leave the . . . [information] in the obscurity from which a trial will draw . . . [it], or it must expose . . . [it] fully". *Id.*, 142 F.2d at 506.

If we examine the conflicting interests involved, the balance is strongly in favor of disclosure. There is no need to dwell on the severity of the injury which petitioner clearly suffers. The freedom of which he is being deprived is a vital one, and the stigma imposed on him drastic—to good name, reputation, livelihood, and opportunity for self-expression and development. On the contrary, the prejudice which the Government claims will flow from disclosure is, to say the least, fanciful. As the Ninth Circuit Court of Appeals put it, in *Parker* v. *Lester*, *supra*, 227 F.2d at 720-721:

> ". . . It is unbelievable that the result [of disclosure] will prevent able officials from procuring proof any more than those officials are now helpless to procure proof for criminal prosecutions . . . Indeed, it may well be that in the long run nothing but beneficial results will come from a lessening of . . . talebearing. It is a matter of public record that the somewhat comparable security risk program directed at Government employees has been used to victimize perfectly innocent men. The objective of perpetuating a doubtful system of secret informers likely to bear upon the innocent as well as upon the guilty and carrying so high a degree of unfairness . . . cannot justify an abandonment here of the ancient standards of due process."

In appraising the relative interests of petitioner and the Government, it is essential to consider just what kinds of information and sources we are urged to protect from revealment. Thus we cannot, of course, know with certainty in our particular case; nor, indeed, whether the information referred to even exists. The general practices

of the State Department, however, make it clear that the secret information here used, such as it may be, is substantially of the same ilk as that widely employed in the Government employee security-risk programs.

In 1956, the Director of the Passport Office testified that there were then *twelve million* index cards against which that Office checked each passport application; that those cards contained information derived from the House Committee on Un-American Activities, intelligence agencies, and "other such sources of information"; and that the information was such as would indicate "whether the person has any reported affiliation with the Communist movement, whether the person is under court restraint, if the person is considered indigent, if the person has a bad reputation or has given bad reputation to the United States by his actions abroad—that sort of information": Hearings (Investigation of the Unauthorized Use of United States Passports), Committee on Un-American Activities, H.R., 84th Cong., 2d sess., May 23, 1956, p. 4314.[16] The Passport Office index included "all pertinent names mentioned in connection with an investigation, besides the name being investigated". *Report of the Commission on Government Security* (1957) 467. Investigative reports of the F.B.I., as one might expect, are among the sources, if not the primary source, of the State Department's files. *Ibid.*; and see R. 66-67.

Thus, the undisclosed data here is derived from that "congeries of information, important or trivial, authentic

[16] See, also, testimony of Mr. Scott McLeod, Administrator of the Department's Bureau of Security and Consular Affairs, in Hrgs. (Security and Constitutional Rights), *supra*, 167: ". . . we would receive information from any source in the Government or outside the Government that felt they wanted to apprise the Passport Office of the possibility that someone might travel if they felt that there was some reason why they should not travel. Any of the agencies of the Government are perfectly at liberty to give us any information they may have that relates to this question and private citizens are also at liberty to do so."

or mere gossip, significant or meaningless, that through the years has accumulated in the records" of the F.B.I. and other governmental and quasi-governmental agencies and bureaus. Bontecou, *The Loyalty-Security Program* (1953) 95. And its reliability is of the same dubous quality. See Bontecou, *op. cit.*, 82-90, 95-98, and *passim;* Barth, *The Loyalty of Free Men* (1951) 157-159, 162-165.[17]

It is not surprising therefore, that even the State Department lacks confidence in the integrity of the information on which it relies. This is dramatically illustrated by several cases which have recently received publicity. *Dr. Linus Pauling*, the world renowned chemist, was refused a passport for two and a half years because, said the Department, undisclosed sources had alleged that he was "a concealed member of the Communist Party" and displayed "a consistent and prolonged adherence to the Communist Party line". Nevertheless, when, in 1954, Dr. Pauling was awarded the Nobel Prize, the Department, with alacrity and without further evidence or hearing, reversed itself and issued a passport.[18] *Dr. Martin Kamen*, a scholar in radiation physics and biochemistry, was refused a passport for some eight years because the Department insisted it had information that he was a supporter of the Communist movement and was going abroad for the purpose of advancing that movement. When he sued in the courts, the Department reversed itself and issued a pass-

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[17] The character of information in State Department confidential files is exemplified by the advice afforded petitioner by the Board of Passport Appeals that among the persons with whom petitioner's relationship was considered pertinent to his eligibility for a passport was Mr. Louis S. Weiss (R. 49). Mr. Weiss, the father of one of petitioner's friends (R. 142-143), was, until his death in 1950, a member of the New York law firm which still includes his name: Paul, Weiss, Rifkind, Wharton and Garrison. Martindale-Hubbell Law Directory (1958).

[18] Pauling, *My Efforts to Obtain a Passport*, 8 Bull. of Atomic Scientists 253 (1952); and see testimony of Dr. Pauling (Hrgs. [Security and Constitutional Rights], *supra*, 103-141); and of Mr. Scott McLeod (*Id.*, 186-195).

port without further hearing or other evidence.[19] *Dr. Otto Nathan*, executor of the estate of Albert Einstein, was denied a passport for nearly two years. During the course of his appeal in the court below, the Department filed an affidavit averring that "after full and careful consideration", it "has concluded that it would be contrary to the best interests of the United States" to issue a passport to Dr. Nathan. The court nevertheless ordered that a prompt quasi-judicial hearing be afforded Dr. Nathan. Within four days of that order, the Department granted him a passport without further hearing. *Dulles* v. *Nathan*, 225 F.2d 29.

The findings in our very case betray the will-of-the-wisp quality of the information on which the Secretary depends. He evaluates the confidential information related to three of his findings as "*indicating*" facts, whereas the information related to the fourth finding is spoken of as "*establishing*" facts (R. 276-277). This startling dichotomy is, we are sure, not inadvertent; the Secretary is too able a lawyer and a draftsman. Obviously, he himself is not persuaded that the confidential information on which he depends is reliable. And how can we accord any respect whatever to his statement in Finding IV: that confidential information "*indicates*" that Dr. Peters "is *suspected* of being a Communist espionage agent" (R. 277). Here, indeed, is suspicion heaped upon surmise.

Such incredulity is understandable when we note that the Secretary concededly himself sometimes does not know the identity and so cannot judge the veracity of his informants. See the stipulation in *Kamen* v. *Dulles*, D.D.C., Civil Action No. 1121-55, which appears in Hrgs. (Security and Constitutional Rights), *supra*, 92-93; and the affidavit of John Foster Dulles, dated Jan. 11, 1956, in the

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[19] See Hrgs. (Security and Constitutional Rights), *supra*, 88-94, 212-214; Boudin, 56 Columbia L.R., *supra*, 68, n. 127.

record on appeal in *Boudin* v. *Dulles*, Court of Appeals, D.C., No. 13031. Since he himself has no opportunity to ascertain the credibility of the confidential informants, the Secretary perforce abdicates judgment to the F.B.I. and to the other agencies whose anonymous reports he indiscriminately employs. Here, too, as in the Government employee cases, judgments are reached on evidence which he who judges "cannot even appraise. The critical evidence may be the word of an unknown witness who is 'a paragon of veracity, a knave, or a village idiot'. His name, his reputation, his prejudices, his animosities, his trustworthiness are unknown both to the judge and to the accused . . ." *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 180 (Douglas, J., concurring). This Court has cautioned that "[j]udgment on issues of public moment based on such evidence, not subject to probing by judge and opposing counsel, is apt to be treacherous", *Eccles* v. *Peoples Bank*, 333 U.S. 426, 434. Due process is clearly lacking when the officer authorized to decide is denied access to the very information essential to his decision.

The vice of permitting an Executive officer *carte blanche* in decisions affecting liberty, where the record is subject neither to examination, cross-examination, and refutation, nor to judicial scrutiny, becomes apparent at another point in the history of our case. When this action came on initially for consideration in the District Court, the affidavit submitted by the Department stated that the Science for Victory Committee "was reported to have been organized by the Communist Party for propaganda purposes" (R. 55). After remand to the Department, the Secretary, on the basis of the same undisclosed information (it is not suggested that anything more was added), characterizes the Committee as one "conceived and organized by Communist Party officials as a front for propaganda and *espionage* activities" (R. 276; emphasis supplied). Sarant, initially described as a person to whom Julius Rosenberg "was known personally" (R. 54), in the later

version becomes a person "[who] was *involved in the espionage apparatus of Julius Rosenberg.*" (R. 277; emphasis supplied) These are by no means insignificant variations.

Involvement in espionage is a serious matter, and one does not expect such charges to be casually indulged in by responsible government officials. Yet, once allow Government officers to evaluate and interpret confidential reports *in camera*, and to summarize and characterize them as they will; and we shall inevitably find such variable glosses on the record and shall ever remain helpless to search out the truth. Here indeed is a fertile field abounding in vast oportunities for subjective judgments, where secrecy most amply "provides a cloak for the malevolent, the misinformed, the meddlesome, and the corrupt to play the role of the informer undetected and uncorrected." *United States ex rel. Knauff* v. *Shaughnessy, supra*, 338 U.S. at 551 (Jackson, J., dissenting).

F. *The appeal to the war power.*

The Secretary seeks support for secrecy also in the war power. In this respect, he refers us to *Hirabyashi* v. *United States*, 320 U.S. 81 and *Korematsu* v. *United States*, 323 U.S. 214.

A reading of those cases, however, reveals that, "Nothing short of apprehension by the proper military authorities of the gravest imminent dangers to the public safety can constitutionally justify" governmental restrictions such as there involved. *Korematsu*, 323 U.S. at 218. Accepting the Secretary's every finding and conclusion in this proceeding, the dangers from petitioner's travel to India could not in the least wit approximate the evils which the military orders in *Hirabyashi* and *Korematsu* sought to avert. Furthermore, in *Hirabyashi* and *Korematsu*, this Court ascribed considerable significance to the cooperation there evinced between the Congress and the Executive in their joint approval of the standards established

by the military. See *Hirabyashi, supra,* 320 U.S. at 91-92, 95, 104, and *Korematsu, supra,* 323 U.S. at 217-218. Such joint action, however, is lacking here; Congress has at no time approved the standards for passport denial or procedures here applied (see Point VII, *infra.*)

Such attempted aggrandizement of Executive authority by resort to the war power has only recently been struck down: *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579. Moreover, there is an obvious and radical difference between conditions which prevail during an actual state of war and those attending an emergency, such as that confronting us today. Cf. Pye, *The Legal Status of the Korean Hostilities,* 45 Georgetown L.J. 45 (1956). To depart from traditional due process, reluctant though one may be to do so, during a period of actual war, "when there is no time for 'litigious interruption'. *Falbo* v. *United States,* 320 U.S. 549, 554" (*United States* v. *Nugent,* 346 U.S. 1, 10), is one thing. To ignore fair procedures when, whatever the urgency of the world struggle, we are not in the midst of a shooting war, is quite another. "The enemy is not yet so near the gate that we should allow respect for the tradition of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies". *United States* v. *Nugent, supra,* 346 U.S. at 13 (Frankfurter, J., dissenting). The late Mr. Justice Jackson, more than a decade ago, cautioned against such a perversion of the war power as to afford a permanent excuse for unlimited Executive authority. *Woods* v. *Cloyd W. Miller Co.,* 333 U.S. 138, 146-147 (Jackson, J., concurring).[20]

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[20] Mr. Justice Jackson said, in part:

"No one will question that this [the war] power is the most dangerous one to free government in the whole catalogue of powers. It usually is invoked in haste and excitement when calm legislative consideration of constitutional limitation is difficult. It is executed in a time of patriotic fervor that makes moderation unpopular. And, worst of all, it is interpreted by the judges

G. *Conclusion.*

It is crystal clear that the practice here applied, by which petitioner has been deprived of his liberty on the basis of secret information, seriously threatens the fabric of our democratic way of life. Many years ago, Mr. Justice Matthews admonished that " the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself". *Yick Wo* v. *Hopkins*, 118 U.S. 356, 370.

The Secretary's reliance on undisclosed information is plainly in violation of due process. The feeble excuses offered for its use do not justify departure from traditional standards of fairness. Mr. Justice Frankfurter has aptly enunciated the principles which should govern here (*Joint Anti-Fascist Refugee Committee* v. *McGrath*, *supra*, 341 U.S. at 170-172, concurring):

> "The heart of the matter is that democracy implies respect for the elementary rights of men, however

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under the influence of the same passions and pressures. Always . . . the Government urges hasty decision to forestall some emergency or serve some purpose and pleads that paralysis will result if its claims to power are denied or their confirmation delayed.

"Particularly when the war power is invoked to do things to the liberties of people, or to their property or economy that only indirectly affect conduct of the war and do not relate to the management of the war itself, the constitutional basis should be scrutinized with care.

". . . I cannot accept the argument that war powers last so long as the effects and consequences of war for, if so, they are permanent—as permanent as the war debts . . ."

The decisions of the House of Lords in *Rex* v. *Halliday* (*Ex parte Zadig*), [1917] A.C. 260, and in *Liversidge* v. *Anderson*, [1942] A.C. 206, on which the Secretary has also relied, were cases likewise decided during the heat of wars and when Great Britain was in mortal danger of invasion. We respectfully refer the Court to the eloquent dissent of Lord Shaw in *Ex Parte Zadig*, *supra*, [1917] A.C. at 292.

suspect or unworthy; a democratic government must therefore practice fairness; and fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights.

"An opportunity to be heard may not seem vital when an issue relates only to technical questions susceptible of demonstrable proof on which evidence is not likely to be overlooked and argument on the meaning and worth of conflicting and cloudy data not apt to be helpful. But in other situations an admonition of Mr. Justice Holmes becomes relevant. 'One has to remember that when one's interest is keenly excited evidence gathers from all sides around the magnetic point . . .' It should be particularly heeded at times of agitation and anxiety, when fear and suspicion impregnate the air we breathe . . . Appearances in the dark are apt to look different in the light of day.

"Man being what he is cannot safely be trusted with complete immunity from outward responsibility in depriving others of their rights. At least such is the conviction underlying our Bill of Rights. That a conclusion satisfies one's private conscience does not attest its reliability. The validity and moral authority of a conclusion largely depend on the mode by which it was reached. Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done."[21]

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[21] In one of Mr. Justice Jackson's last addresses (40 A.B.A.J. 19,21 (1954)), he said: "We cannot approve of any use of official powers or position to prejudice, injure or condemn a person in liberty, property or good name, which does not inform him of the source and substance of the charge and give a timely and open-minded hearing as to its truth—safeguards without which no judgment can have a sound foundation".

III.

The Hearing In The State Department Did Not Conform With The Administrative Procedure Act.

[We have presented the arguments relating to the constitutional status of the right to travel and to a passport (Point I) and the due process requirements of a fair hearing (Point II) prior to consideration of the impact of the Administrative Procedure Act (Point III), not because we are unmindful of our responsibility to give recognition to the doctrine that constitutional issues are to be avoided when a case can properly and fairly be decided on a more limited basis (*Peters* v. *Hobby*, *supra*; *Alma Motor Co.* v. *Timken Co.*, 329 U.S. 129); but rather because, as will appear, such constitutional considerations become pertinent to the question whether the Administrative Procedure Act governs this proceeding.]

No statute expressly provides that adjudications of passport denial by the Secretary of State "be determined on the record after opportunity for an agency hearing" (Administrative Procedure Act, June 11, 1946, c. 324, § 5, 60 Stat. 239, 5 U.S.C. 1004). Nevertheless, as we have shown (Points I and II), the Constitution compels that a fair hearing be accorded an applicant before a passport may be refused him. Accordingly, under the doctrine of *Wong Yang Sung* v. *McGrath*, *supra*, the formal requirements of the Administrative Procedure Act would appear to control this proceeding.

Nor would the exception embodied in the Act: "to the extent that there is involved . . . foreign affairs functions" (5 U.S.C. 1004), seem to be applicable. As the court below has said, "The issuance of a passport is not the conduct of foreign affairs" (R. 300); an observation fully justified by the recent transformation of the passport from a mere certificate of identity and letter of introduction to a foreign state to a prerequisite for foreign travel (see *supra*, pp. 20-21). The term "foreign affairs functions" was

not intended by the Congress "to be loosely interpreted to mean any function extending beyond the borders of the United States but only those 'affairs' which so affect relations with other governments that, for example, public rule making provisions would clearly provoke definitely undesirable international consequences". Sen. Rep. 752, 79th Cong., 1st sess., p. 13; H.R. Rep. 1980, 79th Cong., 2d sess., p. 257; 92 Cong. Rec. 5650; see, also, Atty. Gen. Manual on the Administrative Procedure Act 26-27 (1947).

It is incontrovertible that, in several significant respects, the State Department proceeding in this case did not comply with the formal requirements of the Administrative Procedure Act. Thus:

(1) As we have shown (Point II), the decision of passport denial was based in vital part on undisclosed information, with respect to which perforce petitioner was not accorded the right "to conduct such cross-examination as . . . [was] required for a full and true disclosure of the facts"; as section 7(c) of the Act, 5 U.S.C. 1006(c) (*infra*, p. 75) requires.

(2) The record acted upon by the Board of Passport Appeals and the Secretary admittedly included information other than the "transcript of testimony and exhibits" (see Point II); in violation of section 7(d) of the Act, 5 U.S.C. 1006(d) (*infra*, p. 75).

(3) Petitioner was at no time informed of or furnished with the recommendation of the Board of Passport Appeals, nor was he accorded an opportunity to file exceptions thereto (R. 9); in violation of section 8(b) of the Act, 5 U.S.C. 1007(b) (*infra*, p. 76).

(4) The Board of Passport Appeals, before formulating its recommendation, made its own supplemental investigation (R. 5); thus undoubtedly consulting other persons, without giving petitioner notice and opportunity

to participate; in violation of section 5(c) of thte Act, 5 U.S.C. 1004(c) (*infra*, p. 74).

If, then, the Administrative Procedure Act is here applicable, the Secretary's decision of passport denial must be set aside. 5 U.S.C. 1009(e) (*infra*, pp. 76-77).

IV.

The Denial Of A Passport To Petitioner Violates Due Process Because Of The Vagueness Of The Grounds On Which The Secretary's Decision Is Based.

Petitioner has stated under oath that his purpose in going abroad is to accept an appointment as research physicist at the Tata Institute of Fundamental Research in Bombay, India (R. 6, 12). The Secretary quite properly accepts petitioner's statement (R. 277). Nonetheless, and notwithstanding petitioner's repeated disavowal (R. 12, 160), the Secretary concludes that there is "reason to believe, on the balance of all the evidence, that . . . [petitioner] is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement"; and he denies the passport on that ground and "because the issuance of a passport would be contrary to the national interest" (R. 278). Nowhere in this extensive record is there any specification of the activities in which the Secretary believes petitioner will engage abroad; or of the manner in which such activities, whatever they may be, "will advance the Communist movement" or adversely affect "the national interest".

We have shown that the "facts" on which the Secretary's decision depends consist in essential part of undisclosed information; and that, for that reason, petitioner's liberties have been infringed without due process (Point II). We shall show that the Secretary's findings in any event, afford no rational basis for the conclusions he has reached (Point V). Assume, however, that all the

"facts" which the Secretary recites are true, and that his conclusions are reasonable; the criteria on which he posits the passport denial are nonetheless so hopelessly vague that they cannot satisfy due process requirements.

The first standard—engagement "in activities which will advance the Communist movement"—is that embodied in section 51.135(c) of the Passport Regulations, which makes it applicable without regard to "formal affiliation with the Communist Party" (*supra*, p. 2). And, there is no charge that petitioner has had any "formal affiliation" with the Party. Who then, under such circumstances, can, with any certainty, know what is meant by the term "Communist movement"? The term is obviously no more meaningful than the epithets "un-American" or "subversive propaganda", but recently condemned by this Court as eluding definition. *Watkins* v. *United States*, 354 U.S. 178, 202, 214; *See, also, Sweezy* v. *New Hampshire*, 354 U.S. 234, 246-247; *Jencks* v. *United States*, *supra*, 353 U.S. at 678 (Burton, J., concurring); *United States* v. *Peck*, 154 F.Supp. 603 (D.D.C.); see *United States* v. *Hautau*, 43 F.Supp. 507 (D.N.J. Nor do the Secretary's decision here or the Passport Regulations afford any guide to its meaning.[22]

Even more ambiguous is the phrase "*advancement* of the Communist movement". The term "sympathizer" in relation to testimony with respect to "Communism or Communist interests" has been held so vague as to void

[22] We are cognizant that the terms "world Communist movement" and "Communist movement" appear in the Internal Security Act of 1950, 50 U.S.C. 781 *seq.*, and have frequently been employed by Congressional committees and executive and judicial agencies. See *Briehl* v. *Dulles*, *supra*, 248 F.2d at 565-566. But the terms criticized in *Watkins* have been even more widely used. It is notable that although the Internal Security Act contains a list of definitions (50 U.S.C. 782), it includes none for the term "Communist movement." The obvious intendment is so vast and limitless that no reasonably certain guide is furnished the individual whose liberties must depend on what the term means.

an indictment for perjury. *United States* v. *Lattimore*, 215 F.2d 847, 849 (C.A.D.C.). "Follower of the Communist line" and "promoter of Communist interest" likewise have been held fatal to an indictment for perjury. *United States* v. *Lattimore*, 127 F.Supp. 405, 410, 411-412 (D.D.C.), aff'd. by equally divided Court, 232 F.2d 334 (C.A.D.C.). And, in *O'Connor* v. *United States*, 240 F.2d 404 (C.A.D.C.), the court set aside a conviction for contempt, under 2 U.S.C. 192, for refusal to respond to a question as to membership in "the Communist conspiracy", words held too "vague and imprecise" to satisfy constitutional requirements.

The second standard which the Secretary invokes—"contrary to the national interest"—is at least equally amorphous. As Professor Commager notes, this is "just the kind of official standard of conduct which has always characterified totalitarian countries"; and he acutely observes that even as we do not know, so the State Department does not know, "what are these interests which we are supposed to serve by our travel overseas". Commager, *A Nation of Travelers*, Editorial, Saturday Rev., Jan. 11, 1958, p. 69. In truth, this is no standard at all. The recent frank testimony of the Deputy Under Secretary of State makes plain that it is but a cloak for the Secretary's claim of absolute, unbridled discretion in the passport field.[23]

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[23] Deputy Under Secretary Murphy testified, as follows (Hrgs., [Dept. of State Passport Policies], Comm. on Foreign Relations, Senate, 85th Cong., 1st sess., Apr. 2 and 11, 1957, pp. 9-10):

> *Senator Fulbright.* . . . Do you consider the Secretary of State has complete discretion as to whether any American citizen may leave the United States?
>
> *Mr. Murphy.* Yes, sir; I think he does under our law and regulations.
>
> * * * * *
>
> *Senator Fulbright.* . . . Does the Secretary have complete discretion in prescribing activities which may be engaged

In *United States* v. *Cohen Grocery Co.*, 255 U.S. 81, 89, Chief Justice White characterized the attempted enforcement of the standard there held void as "the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury". Earlier this Term, reversing the conviction of a labor organizer for soliciting members without the permit required by a city ordinance under which the Mayor and city council might refuse its grant "if they do not approve of the applicant or of the union or of the union's 'effects upon the general welfare of the citizens of the City of Baxley' ", this Court

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in abroad by an American citizen, as a condition to the issuance of his passport?

Mr. Murphy. Yes, sir; I would say that particularly under this state of emergency which we now have, if the Secretary of State felt that the citizen was to engage in activities which would be detrimental to our national interests, he would have the discretion to refuse the passport.

Senator Fulbright. If he thought the manners of the man were so egregious that they would cause reflections upon us, he could refuse the passport? . . . that he would be a poor representative of our country.

Mr. Murphy. It would be a test of judgment there as to whether the activity would be injurious to our national interests.

Senator Fulbright. But if he thinks so, he may refuse the passport?

Mr. Murphy. I think in the honest exercise of his discretion, he would have the authority.

Apparently it was under this nebulous standard that Congressman Leo Isaacson was denied a passport because he was going abroad to attend a conference to aid Greek rebels; that Reverend J. Henry Carpenter, a highly respected inter-faith leader, who had once urged "high level negotiations" with the Soviet Union, was denied a passport to visit Japan; and that Reverend Stephen N. Fritchman was not permitted to attend and speak before the 100th anniversary of Unitarianism in Melbourne. Jaffe, *The Right to Travel: The Passport Problem*, 35 Foreign Affairs 17, 24 (Oct. 1956). For other passport denials on the same ground, see Comment, 61 Yale L.J., *supra*, at 174-178.

said (*Staub* v. *City of Baxley*, No. 48, O.T. 1957, Jan. 13, 1958, *slip. op.*, 9):

> ". . . These criteria are without semblance of definitive standards or other controlling guides governing the action of the Mayor and council in granting or withholding a permit. . . . It is thus plain that they act in this respect in their uncontrolled discretion."

These appraisals are peculiarly pertinent to the criterion, "the national interest", employed in our case.

In short, both grounds on which the Secretary bars petitioner from a passport and from foreign travel lack the reasonable certainty of due process criteria. They serve but as convenient vehicles for exercise of the Secretary's subjective political attitudes, leaving him free to grant or deny a passport at whim. They afford no basis for intelligent review by the courts. They furnish no meaningful guide for a citizen who wishes to maintain his liberty of travel or to regain it once the Secretary has withdrawn it. Such formulae permit no one possibly to know what conduct will render him ineligible for passport facilities. Neither petitioner nor anyone else can reasonably understand what he may or may not do lest he fall within the Kafkian net of involvement such criteria weave. Denial of liberty to travel on such ambiguous grounds, so vague and indefinite "that men of common intelligence must necessarily guess at . . . [their] meaning and differ as to . . . [their] application violates the first essential of due process of law". *Connally* v. *General Construction Co.*, 269 U.S. 385, 391; *Cline* v. *Frink Dairy Co.*, 274 U.S. 445; *International Harvester Co.* v. *Kentucky*, 234 U.S. 216; *Collins* v. *Kentucky*, 234 U.S. 634; *Lanzetta* v. *New Jersey*, 306 U.S. 451; *Musser* v. *Utah*, 333 U.S. 95; *United States* v. *Cardiff*, 344 U.S. 174, 176.

That we do not have a criminal statute before us is of no moment. Here, too, where the fundamental liberty of travel is involved, ambiguous criteria are constitutionally

objectionable. Cf. *Small* v. *Amer. Sugar Refg. Co.*, 267 U.S. 233, 238-240. Indeed, since, as will appear (Point VI), infringement of petitioner's freedom of association is involved, such an infirmity is especially censurable. *Burstyn* v. *Wilson*, 343 U.S. 495; *Winters* v. *New York*, 333 U.S. 507; *Niemotko* v. *Maryland*, 340 U.S. 268; *Kunz* v. *New York*, 340 U.S. 290; *Staub* v. *City of Baxley*, *supra*.

It was these considerations, we assume, which led Judge Fahy to dissent below (R. 300-302). We doubt, however, that the standard with which he would replace the Secretary's—whether the issuance of a passport "would be likely to cause harm to national defense or to the conduct of foreign affairs" (R. 302)—is sufficiently precise to meet due process requirements. Moreover, when Judge Fahy suggests remand to the Secretary for reconsideration under the standard he would substitute, he disregards the rule, reflected in *Service* v. *Dulles*, 354 U.S. 363, which confines an administrator to the framework of his self-imposed regulations and requires that his action be tested on the grounds on which he in fact relied, not on others deemed appropriate by the courts. See *Securities & Exchange Commission* v. *Chenery Corp.*, 318 U.S. 80; *Securities & Exchange Commission* v. *Chenery Corp.*, 332 U.S. 194, 196.

V.

The Denial Of A Passport To Petitioner Violates Due Process Because There Is No Rational Basis For The Secretary's Conclusions And Because His Decision Constitutes A Judgment Of Guilt By Association.

A. *There is no rational basis for the Secretary's conclusions that petitioner "is going abroad to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully, of advancing that movement" and that issuance of a passport to him "would be contrary to the national interest."*

Assuming, *arguendo*, the propriety of the standards applied and the findings made, this record still discloses no rational basis for the Secretary's decision.

Seeking to comply with the ruling below on the first appeal of this case (*Dayton* v. *Dulles*, 237 F.2d 43), the Secretary, on remand, explicitly set forth four findings and, accompanying each, a statement referring to related confidential information, on which he purported also to base his decision (R. 275-278). It is within the framework of that recital that the passport denial must be judged; and if the recital affords no rational basis for the conclusions on which the passport denial is based, the Secretary's action cannot be sustained. Cf. *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 146.

We consider then each of the four findings which the Secretary made and the undisclosed information he deemed germane to each finding:

Finding I. The Science for Victory Committee

The Secretary finds that petitioner "was active in the Science for Victory Committee while at the University of California during 1943-44, serving as chairman of the organization during much of that period"; and that, as such, "he associated with Frank and Sandra Collins, and

Rose Segure, who had been instrumental in organizing" the Committee (R. 276). Relevant confidential information, says the Secretary, "indicates"[24] that the Committee "was conceived and organized by Communist Party officials as a front for propaganda and espionage activities", and that the Collinses and Segure were members of the Party at the time of their association with petitioner and the Committee (*ibid.*).

Assume the truth of these findings and the existence and accuracy of the undisclosed information. Equally, if not more, significant is what the Secretary fails to find. He nowhere suggests that petitioner ever *knew* that the Committee was organized by the Party or for improper purposes, or that the three named persons were members of the Party. Nor does he find that petitioner, or, indeed, the Committee itself ever *engaged* in Communist propaganda or espionage activities. On the contrary, petitioner testified that the Committee was not dominated by Communists: " . . . What policies it had were policies that partly originated with me and policies with which I agreed. And I was not a Communist. So my answer to . . . [the question whether or not the Committee was dominated by Communists is] 'No' . . ." (R. 83). And, further, that he did not "know of any members of the organization or people active in the organization whom I knew to be Communists" (R. 93). As to the Collinses, petitioner said: " . . . I do not know in the first instance of any information that would make me believe that . . . [they] were members of the Communist Party" (R. 81). Segure attended the Committee's meetings on only two or three occasions, and petitioner had not seen her since 1944; he had not seen Sandra

[24] We have heretofore noted the interesting contrast between the Secretary's use of the term "indicates" to characterize the undisclosed information related to Findings I, III, and IV (R. 276-277) and his use of the term "establishes" with reference to Finding II (R. 276). We deduce from this that the Secretary himself has considerable doubt as to the reliability of the information he relies on (see *supra*, p. 38).

Collins since 1946; and, since 1946, he had met Frank Co
lins casually and only twice, by accident, at a professiona
meeting and in his place of employment (R. 81, 82).

The affidavit which petitioner filed with the Passpor
Office and his testimony before the Board of Passpor
Appeals supply comprehensive accounts of the nature o
the Science for Victory Committee and his affiliation wit
it (R. 17-23, 72-85, 86-88, 90-93). The Committee was
loose *ad hoc* group of persons, constituted in the Sa
Francisco Bay area in 1943, which concerned itself pr
marily, if not solely, with the garnering of support fo
Senator Kilgore's Science Mobilization Bill (R. 73). It
activities were public, and it had no relationship whatev
with the Communist Party; during petitioner's associatio
with the group, no one suggested to him that it was in an
way Communist-inspired or Communist-dominated, or tha
Communists were members (R. 92-93). It is noteworth
that the organization has at no time been listed by th
Attorney General in connection with Government securit
orders or referred to, so far as we know, in any invest
gation of subversion.

Finding II. Alfred Sarant

The Secretary finds that "during the period 1946-195
at Ithaca, New York", petitioner "maintained a close ass
ciation and relationship" with Sarant; that, at petitioner
invitation, Sarant and his wife lived in his home for eig
months in 1947-1948, pending completion of the Sara
home next door; that, thereafter, petitioner and Sara
were neighbors until July, 1950; that, at that time, Sara
became the subject of intensive interrogation by the F.B.
shortly departed from Ithaca, and subsequently enter
Mexico with petitioner's wife (R. 276). Confidential i
formation, the Secretary advises, "establishes" that Sara
was "an active member of the Communist Party; that h
admitted membership during 1943 and 1944; and that "i
was involved in the espionage apparatus of Julius Rose
berg" (R. 276-277).

Here, again, what the Secretary fails to say is more eloquent that what he does say. Assume that Sarant was at one time a Communist Party member and involved in espionage. There is no finding that such activity was contemporaneous with petitioner's association with him or that petitioner was in the least informed of such activity. Petitioner met Sarant in 1946, several years after the alleged admitted membership, and their association terminated in mid-1950. During this short four-year span, petitioner was not aware, if it was a fact, that Sarant was attending Communist Party meetings or was a member of any Communist organization (R. 154). And since July, 1950, he has not seen or heard from Sarant or petitioner's former wife, with whom his erstwhile neighbor had run off (R. 34, 145). (Petitioner secured a decree of divorce in New York on September 1, 1954 (R. 39)).

Finding III. The New York City Apartment Building

The Secretary finds that petitioner "was present during 1949 and 1950, on more than one occasion", in the Morton Street [New York City] apartment building, in which Sarant "was lessee of apartment 6-I" (R. 277). In this connection, the Secretary states that confidential information "indicates that Sarant's apartment . . . was used by Julius Rosenberg and other members of his spy ring for the microfilming of classified United States Government documents which were ultimately transferred to a foreign power" (*ibid.*).

Once more, what is lacking in the Secretary's recital is most significant. Assume petitioner's presence in the building, on one or more occasions, during 1949 and 1950; and that Sarant's apartment there was used by the "Rosenberg spy ring" for espionage purposes. There is, however, not the slightest suggestion that *petitioner's* presence in the building, such as it may have been, was

for any improper purpose.[25] Or, at any time, in the company of Sarant, or Rosenberg, or any of the "other members of his spy ring". Or that petitioner's presence, if indeed he was ever in the building, coincided in time or even in calendar year with that of the Rosenberg group. Or that he ever *knew* or had reason to believe that the Sarant apartment was used by the Rosenberg group or for the unlawful activities alleged.

It must be kept in mind that petitioner has repeatedly and consistently denied, to the F.B.I., before grand juries, and ultimately throughout this proceeding, that he ever set foot even in the apartment building (except on one occasion, in 1951, when, at their request, he accompanied F.B.I. agents to that address) (R. 32, 103, 133-134, 369-370). The Secretary's contrary finding is based on the incredible testimony of the three custodial employees of the building called by the Board of Passport Appeals (R. 171-267).[26]

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[25] Note that the Secretary does not find, as was initially charged (R. 49), that petitioner was ever present in the Sarant apartment, as contrasted to the building. Nor does the Secretary specify on how many occasions or on what dates petitioner was present in the building. The vagueness of this finding suggests that the Secretary shares our view as to the unreliability of the testimony on which he halfheartedly relies (see *infra*, n. 26).

[26] Limitations of space do not permit a detailed analysis of that testimony. On a careful examination, we believe the Court will agree that the testimony is quite incredible and certainly affords no support for the denial of a fundamental liberty to a citizen of the United States.

The witness, Floyd C. Elwyn, is the only one who testifies that petitioner was present in the Sarant apartment: "sitting at the table, at a card table, in the living room. He was having crackers and milk . . ." (R. 175-176). On direct examination by Board counsel, Mr. Elwyn fixes the date of this incident in *September or October of 1950* (R. 175). On cross-examination, during which the chairman of the Board advised (or, to use the term preferred by the chairman, "encouraged") the witness to refuse to answer such questions as he might choose not to answer (R. 188), the witness confirms that date (R. 193-194, 206-207). Then, suddenly, after hours of testifying, we find him confessing error (R. 217-

Finding IV. Bernard Peters

Finally, the Secretary finds that petitioner, "an experienced physicist, has maintained a close association and relationship with one Bernard Peters"; that Peters was responsible for the offer of employment to petitioner at the Tata Institute in Bombay; and that one of his primary stated purposes in going abroad is to work in close collaboration with Peters (R. 277). Confidential information relevant here, says the Secretary, "indicates"

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218); the Board chairman interrupts the cross-examination and recesses the hearing to permit the witness "to refresh his memory" (R. 222-223); and, on his return, presumably "refreshed", Mr. Elywn promptly revises his chronology and now testifies that it was in *December, 1949*, that he saw petitioner in the Sarant apartment (R. 225-226). The witness further testifies that the very first time he ever saw petitioner in the apartment building (as distinguished from the Sarant apartment) was in September or October, 1949 (R. 217, 219, 236). After considerable and largely futile effort to clarify Mr. Elwyn's testimony, it becomes plain that his identification, for whatever it is worth, is based on only four alleged observations: on two occasions, the witness had "brushed by" petitioner in the hallways of the building; on the third occasion, he had observed him, at the card table, for about two or three minutes; and on the fourth occasion, in the basement corridor, again for only a few minutes (R. 244). This was in an apartment building housing approximately 350 people (R. 191). Yet, ignorant of petitioner's name, on the basis of such fleeting observations, he was prepared months later to identify petitioner from a photograph exhibited to him by the F.B.I. for a period of 30 seconds (R. 241, 244).

Mrs. Jean Elwyn, the wife of the first witness, testifies merely that she had observed petitioner on one occasion for a period of approximately five minutes, in the company of two other persons, in the basement area of the apartment building (R. 246-247, 252-253). She cannot fix the date of this incident, but thinks that it was some time in *January, 1950* (R. 247). When asked what it was about petitioner that had enabled her, months later, to identify him, she says that he was "rather small" (R. 253). She admits, however, that the F.B.I. photograph on the basis of which she made the identification was not a full length photograph but only that of a man's head (R. 254). When asked to explain what there was in petitioner's face that was striking, she replies: "There is nothing extraordinary about . . . [his features], just an average looking man in my estimation" (R. 253, 254). Mrs.

that Peters, "who recently renounced his American citizenship, has held membership in the Communist Party outside of the United States; has engaged in numerous Communist activities both in this country and abroad; and is suspected of being a Communist espionage agent" *(ibid.)*.

Again, there is no rational basis for the conclusions the Secretary reaches. Petitioner's research in India would

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Elwyn admits that she never was in the Sarant apartment and never knew anything about it (R. 250).

The third witness, Mr. Floyd Elwyn, Sr., is a man seventy-three years of age (R. 264). He likewise never saw petitioner in the Sarant apartment (R. 259). His testimony is vague, indefinite, and rambling. He saw petitioner somewhere between 1943 or 1944 and 1950; he cannot fix a more definite date (R. 255, 265-266). He puts him at various vague places: "in the entrance of the apartment building" (R. 255); "on one of the landings" (R. 256); "on Morton Street" *(ibid.)*; "in a Grocery Store on Hudson Street" *(ibid.)*. Yet, these incidents were most casual, and there was nothing about petitioner's actions which would have made the witness particularly remember him (R. 257). Indeed, the witness is so cooperative that he is prepared also to identify petitioner's attorney as a person he has seen before (R. 267).

How can any one be expected to do more than petitioner has done to meet these fantastic accusations? When he requested particulars from the Board of Passport Appeals, he was advised that the "information" in the State Department's files indicated his presence in the Morton Street building in July or August, 1949, and in the Sarant apartment during January, 1950 (R. 49). By testimony, affidavit, and documentary evidence, he accounts for his whereabouts during those months and demonstrates that, at no time during those periods, was he even in New York City, let alone the apartment building in question (R. 107-117, 133, 167-170). He calls another witness, Dr. Dale Corson, of Cornell University, to corroborate his proof with respect to January, 1950 (R. 119-124, 127-128). And, suddenly and belatedly, he is confronted with testimony of Mr. Elwyn which, if believed, would put him at the apartment building in September, October and December, 1949; with contradictory testimony of Mrs. Elwyn which would put him there in January, 1950; and with the vague, will-of-the-wisp story spun by the elder Mr. Elwyn, Sr., which would put him there some time between 1943 or 1944 and 1950! When may he expect the hurdy-gurdy to cease?

lie in the field of cosmic-ray, not thermonuclear, physics and would involve no secret or classified data at all (R. 72, 126, 128-129). Both petitioner and Dr. Corson, professor of physics at Cornell University, testified that there is absolutely nothing in the field of cosmic-ray research "which requires the use or which develops into the production . . . of secret or restricted or classified data" (R. 126, 129); "[t]here is no area of research that is more devoid of secrecy" (R. 72). There is no evidence to the contrary. Moreover, here, too, there is no suggestion that petitioner has ever known of Dr. Peters' alleged activities. To the contrary, petitioner testified: Peters "is known to me to be not a Communist. I feel very sure of that" (R. 80). "I cannot conceive of Bernard [Peters] as a member of the Communist Party. I do not know any person to whom 'following a line', Communist or otherwise, would be more alien and impossible." (R. 150) "I . . . have strong reason for believing [that Peters was] not [a member of the Communist Party]" (R. 150).

We have considered these four findings separately for convenience and clarity in presentation. We are prepared, of course, to view them in their entirety. Even in their totality, it should be plain to any reasonable person that the findings and the related undisclosed information afford no conceivably rational basis for the Secretary's conclusions.

In the court below, the Secretary deduced from these findings a "pattern of association" by petitioner (see Br. for Appellee, Appeal No. 13,176, pp. 25-26). We do not understand how a "pattern" (whatever that term may signify) can be woven from (1) an association with the Science for Victory Committee in 1943-1944, for a period of less than two years; (2) an association with Sarant, from 1946 to 1950; (3) presence in the Morton Street apartment building "on more than one occasion", in 1949

and 1950; and (4) friendship with Dr. Peters since 1938. In any event, such a "pattern of association", quite innocent so far as petitioner was concerned, however ingeniously it may be fabricated, cannot rationally lead to the conclusion that, in 1956, years later, petitioner's proposed trip to India was designed "to engage in activities which will advance the Communist movement for the purpose, knowingly and wilfully of advancing that movement" and would be contrary to "the national interest". Cf. *Schware* v. *Board of Examiners*, 353 U.S. 232; *Konigsberg* v. *State Bar of California*, 353 U.S. 252.

If the Secretary has any power to restrain the movements of citizens, such restraint would be reasonable only insofar as it related to the purpose of travel. The political heterodoxy of an applicant's associations would be quite irrelevant. See *Schware* v. *Board of Bar Examiners*, *supra*; *American Communications Association* v. *Douds*, 339 U.S. 382, 391. Here, however, petitioner is barred from leaving the county solely because of his associations. Despite repeated requests, he has never been informed of the dangers against which restraint on his movement is purported to guard. There is no suggestion that he has ever engaged in illegal activity here or would engage in such activities abroad. Moreover, as indicated by Judge Bazelon, in his dissenting opinion in *Bricht* v. *Dulles*, *supra*, 248 F.2d at 587, legislation or regulations directed at the prohibition of travel in order to prevent illegal activities could be sustained only if narrowly drawn for that purpose. And even then, important constitutional questions would be presented by the Government's detention of citizens for preventive purposes rather than as a preliminary to criminal proceedings based upon indictment for past unlawful activities, and on suspicion alone and without evidence of guilt. No decision of this Court sanctions such a restraint.

B. *The Secretary's decision constitutes a judgment of guilt by association.*

The Secretary's findings in this case assume relevance only insofar as they reflect a judgment of petitioner's guilt by association. Patently that is just what the Secretary's decision amounts to. Whether or not the undisclosed information does in fact exist, whether or not it is reliable, whether or not it "indicates" or "establishes" what the Secretary says it does; there is, as we have indicated, not the slightest suggestion either (1) that petitioner ever knew or had reason to know of the alleged wrongful activities of his associates, or (2) that he himself at any point or to any degree ever engaged in any of the activities referred to. All the evidence of record is to the contrary.

What the Secretary has done, then, is to impute to petitioner, notwithstanding his complete innocence and lack of knowledge, misconduct ascribed to his associates. The decision of passport denial is posited not on petitioner's own activities, or knowledge, or state of mind; but instead on his innocent association with persons whose activities the Secretary finds culpable. Thus, we have here a flagrant application of the heinous doctrine of guilt by association, a doctrine alien to our traditions and constitutional principles and "one of the most odious institutions of history". *Joint Anti-Fascist Refugee Committee v. McGrath, supra*, 341 U.S. at 178 (Douglas, J., concurring).

Under our Constitution, such an official finding of vicarious guilt is impermissible. See *Schneiderman v. United States*, 320 U.S. 118, 136; *DeJonge v. Oregon*, 299 U.S. 353; *Herndon v. Lowry*, 301 U.S. 242. "[I]t is of the essence of the institutions of liberty that it be recognized that guilt is personal . . ." Memorial of Special Committee of Assoc. Bar City of New York (1920), largely written by Charles Evans Hughes, quoted in

O'Brian, *Loyalty Tests and Guilt by Association*, 61 Harv. L.R. 592, 594 (1948). See, also, Commager, *Freedom, Loyalty, Dissent* (1954) 93-134, *passim*.

The Secretary's decision of passport denial blatantly violates this Court's strictures in *Wieman* v. *Updegraff*, *supra*; *Schware* v. *Board of Examiners*, *supra*; and *Konigsberg* v. *State Bar of California*, *supra*. The indifference of the majority below to the need for *scienter* is irreconcilable with the opinion, joined in by the same judges, in the earlier case of *Briehl* v. *Dulles*, *supra*, 248 F.2d at 572: ". . . as we read the [passport] regulations, they refer to knowing associations with Communism." Here indeed is a glaring example of that "[i]ndiscriminate classification of innocent with knowing activity [which] must fall as an assertion of arbitrary power." *Wieman* v. *Updegraff*, *supra*, 344 U.S. at 191.

Here, too, it is significant that not a single person has testified that petitioner ever engaged in any unlawful activity or that the purposes of his proposed trip abroad are in any sense questionable. Cf. *Konigsberg*, *supra*, 353 U.S. at 729. Here, too, we are confronted with standards for official action which are "easily adapted to fit personal views and predilections, . . . a dangerous instrument for arbitrary and discriminatory denial" of constitutionally protected rights. *Konigsberg*, *supra*, 353 U.S. at 728. Here, too, there "is no evidence in the record which rationally justifies" the Secretary's conclusions. Cf. *Schware*, 353 U.S. at 760. Here, too, it may aptly be said: "A lifetime of good citizenship is worth very little if it is so frail that it cannot withstand the suspicions which apparently were the basis for the . . . [Secretary's] action". *Konigsberg*, *supra*, 353 U.S. at 734.

VI.

The Secretary's Decision Of Passport Denial Impairs Petitioner's First Amendment Rights And Violates The Principles Of Fairness Implicit In The Constitutional Inhibitions Against Bills Of Attainder And Ex Post Facto Legislation.

A. *The Secretary's decision impairs petitioner's First Amendment rights.*

Petitioner's rights under the First Amendment are clearly breached by the Secretary's passport denial in this case.

Three of the findings on which the Secretary bases his decision (R. 276-277) concern petitioner's associations with an organization (the Science for Victory Committee) and five persons, whose misconduct, in one manner or another, the Secretary deduces from confidential information in State Department files. Another, Finding III, (R. 277), speaks of presence in an apartment building; but it too becomes pertinent, if at all, only insofar as it reflects petitioner's association with "suspect" persons.

The freedom to indulge in such associations, however, are protected from Government restraint by the First Amendment. *Thomas* v. *Collins*, 323 U.S. 516; *DeJonge* v. *Oregon*, *supra*; see *Watkins* v. *United States*, *supra*; *Sweezy* v. *New Hampshire*, *supra*. Government officials may not determine who are good or bad associates. *West Virginia Bd. of Education* v. *Barnett*, 319 U.S. 624; *Thomas* v. *Collins*, *supra*, 323 U.S. at 545 (Jackson, J., concurring).

Beyond this, as this Court recently remarked, in *Watkins* v. *United States*, *supra*, 353 U.S. at 197-198, such restrictions are censurable not only because they affect the particular individual concerned but also because they effect a prior restraint on all citizens, forcing them to limit and modify First Amendment freedoms lest they suffer

a similar fate. The Secretary's action compels all citizens to be circumspect about the company they keep if they want freely to exercise their right to travel abroad. Since "everyone who expects to travel must so comport himself as to satisfy the notions of Federal bureaucracy about political ideas, associations and activities, control over travel . . . become[s] a powerful instrument for Federal control of thought." Commager, *Where Government May Not Trespass*, New York Times Magazine, March 24, 1957, at p. 32.

Even Congress may abridge First Amendment rights only in circumstances where "the gravity of the 'evil', discounted by its improbability, justifies such invasion . . . as is necessary to avoid the danger". *United States v. Dennis*, 183 F.2d 201,212 (C.A. 2), adopted in *Dennis v. United States*, 341 U.S. 494, 510. But here we are referred to no danger of any evil which can justify so radical a restraint on petitioner's freedoms.

Can it be seriously asserted that petitioner's research in India, in the completely unclassified, non-secret, and non-military area of cosmic-ray physics (R. 72, 126, 128-129) spells any danger to our national security and welfare? Is it rational to suggest that we must guard against petitioner's continued association and communication with his friend, Dr. Bernard Peters (see R. 277), particularly since there remains available to petitioner the international mails, an avenue of which we doubt even the Secretary would counsel suspension?

The rubrics coined by the Secretary to justify confinement of petitioner to this country—prevention of "advancement of the Communist movement" and "the national interest"—certainly furnish no persuasive justification for First Amendment invasion. As we have shown (Point IV), these are meaningless concepts, with respect to which, despite our persistent efforts throughout the four years of this exhausting proceeding, the Secretary has still to fur-

nish specification. Such tags, casually employed, are reminiscent of the considerations unsuccessfully advanced by the State in *DeJonge* v. *Oregon, supra,* to which Mr. Justice Black adverted in his dissenting opinion in *American Communications Association* v. *Douds, supra,* 339 U.S. at 453. They are certainly not those cogent considerations which will persuade the courts to sanction abridgement of First Amendment freedoms. See *Watkins* v. *United States, supra,* 354 U.S. at 205-206.

B. *The Secretary's action violates the principles of fairness implicit in the constitutional inhibitions against bills of attainder and retroactive penal legislation.*

The associations on which the Secretary here posits the passport denial (except possibly for the continuing relationship with Dr. Bernard Peters (R. 277)) predate even the promulgation of the Passport Regulations, in August, 1952. The brief association with the Science for Victory Committee occurred during 1943 and 1944 (R. 276); that with Sarant occurred during 1946 to 1950 *(ibid.)*; and the presence in the New York apartment building was "on more than one occasion" during 1949 and 1950 (R. 277).

To deprive petitioner of his freedom of movement on such a basis is clearly to do violence to those principles of fairness implicit in the inhibitions against bills of attainder and retroactive penal legislation embodied in Article I, section 9 of the Constitution. See *Ex parte Garland,* 71 U.S. 333; *Cummings* v. *Missouri,* 71 U.S. 277; *United States* v. *Lovett,* 328 U.S. 303; cf. *American Communications Association* v. *Douds, supra,* 339 U.S. at 412-415.

The Court's opinion in *Douds, supra,* is of particular interest. Holding section 9(h) of the Labor Management Relations Act of 1947 (29 U.S.C. 159(h)) not objectionable as a bill of attainder and *ex post facto* legislation, the Court considered it significant that members of the groups identified by that statute "are free to serve as union of-

ficers if at any time they renounce the allegiances which constituted a bar to signing the affidavit in the past. Past conduct, actual or threatened by their previous adherence to affiliations and beliefs mentioned in 9(h), is not a bar to resumption of the position" (339 U.S. at 414). *Lovett, Garland,* and *Cummings,* on the other hand, had emphasized "that, since the basis of disqualification was past action or loyalty, nothing that those persons proscribed by its terms could ever do would change the result" *(ibid.).*

But here, too, petitioner can do nothing to remove the proscription imposed on him. He obviously cannot turn back the clock and erase the past associations for which he is now being punished. The only course open to him (as indeed the former Director of the Passport Office informally suggested to his counsel) is to forego his proposed trip; in short, to abandon his right to travel and thus to accept the second-class citizenship proffered by his Government.[27]

VII.

The Secretary Had No Authority To Issue The Passport Regulations, Under Which A Passport Was Denied To Petitioner.

The decision of passport denial in this case was rendered under the provisions of the Passport Regulations, promulgated by the Secretary of State on August 28, 1952 (R. 278). (The pertinent provisions of those Regulations are set forth at p. 2, *supra* and pp. 77-84, *infra.*) The Secretary, however, had no authority to issue the Passport Regulations.

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[27] Which would mean that petitioner must also abandon any hope of working again in cosmic-ray physics, the area of science in which he has been educated and is highly skilled. For the stigmatization visited on him by the complex of these security proceedings has made it impossible now to obtain a post in that field in this country (R. 146-147). Thus, not only petitioner suffers; but the nation as well, at a time when we are confronted by a serious dearth of skilled scientists.

On this point, we adopt and respectfully refer the Court to Point II of the Argument in the Brief for Petitioners in *Kent and Briehl* v. *Dulles*, No. 481, this Term, which has been consolidated with the instant case (R. 304). We ask the Court's indulgence of this procedure so that needless repetition and expense may be avoided. In summary, our position on this point is, as follows:

A. *The claimed statutory authority*

(1) *22 U.S.C. 211a*

The Passport Regulations purport to find their source of authority in paragraph 126 of Executive Order No. 7856 (3 F.R. 681; 22 C.F.R. 51.77), issued under authority of section 1 of the Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. 211a. This statute, however, does not confer power to establish substantive categories of persons ineligible for passports. It was merely a reenactment, with minor provisions of the first passport Act enacted in 1856; and the limited purpose of both statutes was to centralize the passport function in the Department of State and to control the procedures of passport issuance. For almost one hundred years, the regulations promulgated pursuant to these statutes were of an administrative and routine nature. That Congress could not have intended these statutes to authorize control of travel in any respect is evident from the fact that passports were not required for lawful departure in peacetime either in 1856 or 1926, being then solely a convenience for the traveller. It was not until 1952 that the Secretary claimed that the 1926 statute authorized regulations of a substantive nature, by which he might establish classifications of citizens to whom passports would be refused.

The claim that the Passport Regulations are authorized by the 1926 statute would render it unconstitutional. For, the statute prescribes no standards whatever to guide the Executive in passport denials. Thus, if the Secretary's claim, that 22 U.S.C. 211a furnishes authority for his regu-

lations, is sustained; we have here an unconstitutional delegation of legislative power.

(2) *8 U.S.C. 1185*

The difficulties of justifying the Passport Regulations by reference to section 215 of the Immigration and Nationality Act of 1952, 8 U.S.C. 1185, are greater even than those which confront us under the 1926 statute.

First, the Passport Regulations themselves do not claim authority from this statute; they are rested exclusively on 22 U.S.C. 211a. The reason they did not refer to 8 U.S.C. 1185 is simple: at the time the regulations were issued, on August 28, 1952, 8 U.S.C. 1185 had not become effective, and there was no other statute in effect forbidding the departure of citizens without a passport. When the President invoked the authority granted by 8 U.S.C. 1185 (Proc. No. 3004, Jan. 17, 1953, 67 Stat. c. 31), although he confirmed certain other regulations of the Secretary, he made no reference whatever to the provisions here in question, *viz.* 22 C.F.R. 51.135-51.170.

Second, 8 U.S.C. 1185 contains no standards whatever for determining to whom passports should be denied and no grant of authority to the President or the Secretary to determine categories of citizens who may and may not receive passports. Thus, to claim authority for the Passport Regulations in that statute would again raise the serious question of an invalid delegation of legislative power.

B. *The conflict with the intent of Congress reflected in other legislation*

(1) *The Internal Security Act of 1950*

Several years before the Immigration and Nationality Act of 1952 was enacted, Congress had already established a class of citizens ineligible to receive passports.

Section 6 of the Internal Security Act of 1950, 64 Stat. 993, 50 U.S.C. 785, made it unlawful for a member of a "Communist organization" to apply for or use a passport, but only either after such an organization had registered under the Act or a final order of the Subversive Activities Control Board requiring such registration was in effect. To date, neither of such events has occurred. Moreover, the statutory proscription in any case would apply only to those who continued to remain members with knowledge or notice of such registration or final order. The Passport Regulations are patently in conflict with this statutory design. And the State Department has conceded as much; for it has repeatedly indicated that its regulations go beyond the 1950 statute. The Secretary is not authorized, by reference to "the spirit of the law", to issue regulations in anticipation and enlargement of the standards thus established by Congress.

(2) *The Expatriation Act of 1868*

As Judge Bazelon pointed out in his dissenting opinion in *Briehl* v. *Dulles*, 248 F.2d at 583, the Passport Regulations also conflict with the declaration by Congress, in the Act of July 27, 1868 (Expatriation Act of 1868), 15 Stat. 223, R.S. § 1999, affirming the right of expatriation as "a natural and inherent right of all people" and declaring any impairment thereof "inconsistent with the fundamental principles of this Government". Since expatriation today is virtually impossible absent departure from the country, the Passport Regulations conflict with the 1868 statute.

C. *The claim of inherent power*

The Secretary also has urged that, even without statutory authority, the Executive has inherent foreign relations power to deny passports on substantive grounds. The short answer to this contention is this Court's recent decision in *Youngstown Sheet and Tube Co.* v. *Sawyer*, 343 U.S. 579. There it was held that Presidential power

"must stem either from an Act of Congress or from the Constitution itself" (at 585) and that, although the Constitution empowers the President to execute the laws, it grants him no law-making authority. The Passport Regulations plainly constitute an exercise of law-making authority. Furthermore, foreign relations powers are limited to matters such as the recognition of foreign governments and our relations with them. As the court below has stated, "The issuance of a passport is not the conduct of foreign affairs" (R. 300).

CONCLUSION

In refusing to issue a passport to petitioner, the Secretary of State has acted unjustly, arbitrarily, and unlawfully. Seeking to exercise his natural right to travel abroad, this citizen has been subjected to an intensive inquisition into his personal affairs and has been required to forego "the right to be let alone—the most comprehensive of rights and the right most valued by civilized men". Under compulsion, he has made full disclosure and has repeatedly testified to facts which clearly remove him from the ambit of the classes of persons whom the Secretary, without legal authority, bars from travel abroad. Notwithstanding, petitioner still finds himself forbidden to travel. And this not by reason of any illegal activities in which he may have engaged. But solely because he has lawfully associated with persons whom the Secretary, on the basis of undisclosed information, brands as disloyal and subversive.

The Secretary's action in this case is in flagrant disregard of the constitutional rights of petitioner. Petitioner has been waiting almost four years now for the passport to which, as a citizen, he is entitled, and without which he is unable to enjoy his right to travel and to practice his profession and earn a livelihood in his chosen endeavor. It is time, we submit, that the grevious wrong he has suffered be redressed.

The judgment of the court below should be reversed and the case remanded to the District Court with directions to enter a judgment for petitioner as prayed for in the complaint.

Respectfully submitted,

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February, 1958

APPENDIX

1. *22 U.S.C. 211a.* The Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. 211a provides, in pertinent part, as follows:

> The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls, when in charge, as the Secretary of State may designate, and by the chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports.

2. *22 U.S.C. 212.* The Act of June 14, 1902, 32 Stat. 386, 22 U.S.C. 212 provides, in pertinent part, as follows:

> No passport shall be granted or issued to or verified for any other persons than those owing allegiance, whether citizens or not, to the United States.

3. Section 215 of the *Immigration and Nationality Act of 1952*, 66 Stat. 190, 8 U.S.C. 1185, as codified, provides, in pertinent part, as follows:

> 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find that the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof, it shall, until otherwise ordered by the President or the Congress, be unlawful—
>
> (1) [There follow restrictions enumerated (1) through (7) not here pertinent.]
>
> * * * *

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclamation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport.

4. Title I, Section 6 of the *Internal Security Act of 1950*, 64 Stat. 993, 50 U. S. C. 785, as codified, provides, in pertinent part, as follows:

(a) When a Communist organization as defined in paragraph (5) of section 782 of this title is registered, or there is in effect a final order of the Board requiring such organization to register, it shall be unlawful for any member of such organization, with knowledge or notice that such organization is so registered or that such order has become final—

(1) to make application for a passport, or the renewal of a passport, to be issued or renewed by or under the authority of the United States; or

(2) to use or attempt to use any such passport.

(b) When an organization is registered, or there is in effect a final order of the Board requiring an organization to register, as a Communist-action organization, it shall be unlawful for any officer or employee of the United States to issue a passport to, or renew the passport of, any individual knowing or having reason to believe that such individual is a member of such organization.

5. The Act of July 27, 1868 (*Expatriation Act of 1868*), 15 Stat. 223, R.S. § 1999 provides, in pertinent part, as follows:

Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the en-

joyment of the rights of life, liberty and the pursuit of happiness; and whereas in the recognition of this principle this government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance to the governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed: Therefore . . . any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation is declared inconsistent with the fundamental principles of this government.

6. The pertinent sections of the *Administrative Procedure Act*, as codified, 5 U.S.C. 1001 seq., provide, in pertinent part, as follows:

§ 1004. Adjudications

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved . . . (4) the conduct of military, naval, or foreign affairs functions; . . .

• • • •

(b) The agency shall afford all interested parties opportunity for (1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit, and (2) to the extent that the parties are unable so to determine any controversy by consent, hearing, and decision upon notice and in conformity with sections 1006 and 1007 of this title.

(c) The same officers who preside at the reception of evidence pursuant to section 1006 of this title shall make the recommended decision or initial decision required by section 1007 of this title except where such officers become unavailable to the agency. Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall

consult any person or party on any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings. . . .

• • • •

§ 1006. Hearings; presiding officers; powers and duties; burden of proof; evidence; record as basis for decision.

In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section—

• • • •

(c) Except as statutes otherwise provide, the proponent of a rule or order shall have the burden of proof. Any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts.

(d) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, shall constitute the exclusive record for decision in accordance with section 1007 of this title and, upon payment of lawfully prescribed costs, shall be made available to the parties. Where any agency

decision rests on official notice of a material fact not appearing in the evidence in the record, any party shall on timely request be afforded an opportunity to show the contrary.

§ 1007. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record

In cases in which a hearing is required to be conducted in conformity with section 1006 of this title—

• • • •

(b) Prior to each recommended, initial, or tentative decision, or decision upon agency review of the decision of subordinate officers the parties shall be afforded a reasonable opportunity to submit for the consideration of the officers participating in such decisions (1) proposed findings and conclusions, or (2) exceptions to the decisions or recommended decisions of subordinate officers or to tentative agency decisions, and (3) supporting reasons for such exceptions or proposed findings or conclusions. The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record; and (2) the appropriate rule, order, sanction, relief, or denial thereof.

• • • •

§ 1009. Judicial review of agency action

Except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion.

• • • •

(e) So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of any agency action. It shall

(A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of section 1006 and 1007 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.

7. The *Passport Regulations* of the Secretary of State, as amended (22 C.F.R. 51.135-51.170), are as follows:

§ 51.135.—This section is reproduced at p. 2, *supra*.

§ 51.136* *Limitations on Issuance of passports to certain other persons.* In order to promote and safeguard the interests of the United States, passport facilities, except for direct and immediate return to the United States, will be refused to a person

* Prior to the Secretary's amendment of January 18, 1956, 21 F. R. 336, this section read as follows:

"§ 51.136 *Limitations on Issuance of Passports to Persons Likely to Violate Laws of the United States.* In order to promote the national interest by assuring that the conduct of foreign relations shall be free from unlawful interference, no passport, except one limited for direct and immediate return to the United States, shall be issued to persons as to whom there is reason to believe, on the balance of all the evidence, that they are going abroad to engage in activities while abroad which would violate the laws of the United States, or which if carried on in the United States would violate such laws designed to protect the security of the United States."

when it appears to the satisfaction of the Secretary of State that the person's activities abroad would: (1) violate the laws of the United States; (2) be prejudicial to the orderly conduct of foreign relations; or (3) otherwise be prejudicial to the interests of the United States.

§ 51.137. *Notification to persons whose passport application is tentatively disapproved.*—A person whose passport application is tentatively disapproved under the provisions of § 51.135 or § 51.136 will be notified in writing of the tentative refusal, and of the reasons on which it is based, as specifically as in the judgment of the Department of State security considerations permit. He shall be entitled, upon request, and before such refusal becomes final, to present his case and all relevant information informally to the Passport Division. He shall be entitled to appear in person before a hearing officer of the Passport Division, and to be represented by counsel. He will, upon request, confirm his oral statements in an affidavit for the record. After the applicant has presented his case, the Passport Division will review the record, and after consultation with other interested offices, advise the applicant of the decision. If the decision is adverse, such advice will be in writing and shall state the reasons on which the decision is based as specifically as within the judgment of the Department of State security limitations permit. Such advice shall also inform the applicant of his right to appeal under § 51.138.

§ 51.138. *Appeal by passport applicant.*—In the event of a decision adverse to the applicant, he shall be entitled to appeal his case to the Board of Passport Appeals provided for in § 51.139.

§ 51.139. *Creation and Functions of Board of Passport Appeals.*—There is hereby established within the Department of State a Board of Passport Appeals, hereinafter referred to as the Board, composed of not less than three officers of the Department to be designated by the Secretary of State. The Board shall act on all appeals under § 51.138. The Board shall adopt and make public its own rules of procedure, to be approved by the Secretary, which

shall provide that its duties in any case may be performed by a panel of not less than three members acting by majority determination. The rules shall accord applicant the right to a hearing and to be represented by counsel, and shall accord applicant and each witness the right to inspect the transcript of his own testimony.

§ 51.140. *Duty of Board to advise Secretary of State on action for disposition of appealed cases.*— It shall be the duty of the Board, on all the evidence, to advise the Secretary of the action it finds necessary and proper to the disposition of cases appealed to it, and to this end the Board may first call for clarification of the record, further investigation, or other action consistent with its duties.

§ 51.141. *Bases for findings of fact by Board.*— (a) In making or reviewing findings of fact, the Board, and all others with responsibility for so doing under §§ 51.135 to 51.143, shall be convinced by a preponderance of the evidence, as would a trial court in a civil case.

(b) Consistent and prolonged adherence to the Communist Party line on a variety of issues and through shifts and changes of that line will suffice, prima facie, to support a finding under § 51.135(b).

§ 51.142. *Oath or affirmation by applicant as to membership in Communist Party.*—At any stage of the proceedings in the Passport Division or before the Board, if it is deemed necessary, the applicant may be required, as a part of his application, to subscribe, under oath or affirmation, to a statement with respect to present or past membership in the Communist Party. If applicant states that he is a Communist, refusal of a passport in his case will be without further proceedings.

§ 51.143.* *Applicability of Sections 51.137-51.142.*

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* Prior to the Secretary's amendment of January 18, 1956, this section read, as follows:

"§ 51.143. *Applicability of Sections 51.135-51.142.* When the standards set out in § 51.135 or § 51.136 are made relevant

Except for action taken by reason of noncitizenship or geographical limitations of general applicability necessitated by foreign policy considerations, the provisions of §§ 51.137-51.142 shall apply in any case where the person affected takes issue with the action of the Secretary in granting, refusing, restricting, withdrawing, canceling, revoking, extending, renewing or in any other fashion or degree affecting the ability of such person to receive or use a passport.

RULES OF THE BOARD OF PASSPORT APPEALS

§ 51.151. *Organization of Board.*—The Secretary of State shall appoint a Board of Passport Appeals consisting of three or more members, one of whom shall be designated by the Secretary as Chairman. The Chairman shall assure that there is assigned to hear the appeal of any applicant a panel of not less than three members including himself or his designee as presiding officer, which number shall constitute a quorum.

§ 51.152. *Decisions of the Board.*—Decisions shall be by majority vote. Voting may be either in open or closed session on any question except recommendations under § 51.140, which shall be in closed session. Decisions under § 51.140 shall be in writing and shall be signed by all participating members of the Board.

§ 51.153. *Counsel to the Board.*—A Counsel, to be designated by the Secretary of State, shall be responsible to the Board for the scheduling and presentation of cases, aid in legal and procedural matters, information to the applicant as to his pro-

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by the facts of a particular case to the exercise of the discretion of the Secretary under § 51.75, the standards in §§ 51.135 and 51.136 shall be applied and the procedural safeguards of §§ 51.137-51.142 shall be followed in any case where the person affected takes issue with the action of the Department in granting, refusing, restricting, withdrawing, cancelling, revoking, extending, renewing, or in any other fashion or degree affecting the ability of a person to use a passport through action taken in a particular case."

tedural rights before the Board, maintenance of records and such other duties as the Board or the Chairman, on its behalf, may determine.

§ 51.154. *Examiner.*—The Board may, within its discretion, appoint an examiner in any case, who may, with respect to such case, be vested with any or all authority vested in the Board or its presiding officer, subject to review and final decision by the Board, but, an applicant shall not be denied an opportunity for a hearing before the Board unless he expressly waives it.

§ 51.155. *Chairman.*—The Chairman, or his designee, shall preside at all hearings of the Board, and shall be empowered in all respects to regulate the course of the hearings and pass upon all issues relating thereto. The Chairman, or his designee, shall be empowered to administer oaths and affirmations.

§ 51.156. *Prior administrative remedies.*—It is required that prior to petitioning for an appeal, an applicant shall (a) exhaust the administrative remedies available in the Passport Office, as set out in § 51.137, and (b) comply with the provisions of § 51.142, as a part of his application, if deemed necessary by the Passport Office.

§ 51.157. *Petition.*—An applicant desiring to take an appeal shall, within thirty calendar days after receipt of the advice of adverse decision by the Passport Office file with the Board a written petition under oath or affirmation which shall, in plain and concise language, refute or explain the reason stated by the Passport Office for its decision.

§ 51.158. *Delivery of papers.*—Petitions or other papers for the attention of the Board may be delivered personally, by registered mail or by leaving a copy at the offices of the Board at the address to be stated in the advice of adverse action furnished applicant by the Passport Office.

§ 51.159. *Notice of hearing.*—Applicant shall receive not less than five calendar days notice in writing of the scheduled date and place of hearing

which shall be set for a time as soon as possible after receipt by the Board of applicant's petition.

§ 51.160. *Appearance.* — Any party to any proceedings before the Board may appear in person, or by or with his attorney, who must possess the requisite qualifications, as hereinafter set forth, to practice before the Board.

§ 51.161. *Applicant's attorney.*—(a) Attorneys at law in good standing who are admitted to practice before the Federal courts or before the courts of any State or Territory of the United States may practice before the Board.

(b) No officer or employee of the Department of State whose official duties have, in fact, included participation in the investigation, preparation, presentation, decision or review of cases of the class within the competence of the Board of Passport Appeals shall, within two (2) years after the termination of such duties appear as attorney in behalf of an applicant in any case of such nature, nor shall any one appear as such attorney in a case of such class if in the course of prior government service he has dealt with any aspects of the applicant's activities relevant to a determination of that case.

§ 51.162. *Supplementary information to applicant.*—The purpose of the hearing is to permit applicant to present all information relevant and material to the decision in his case. Applicant may, at the time of filing his petition, address a request in writing to the Board for such additional information or explanation as may be necessary to the preparation of his case. In conformity with the relevant laws and regulations, the Board shall pass promptly and finally upon all such requests and shall advise applicant of its decision. The Board shall take whatever action it deems necessary to insure the applicant of a full and fair consideration of his case.

§ 51.163. *Hearings.*—The Passport file and any other pertinent Government files shall be considered as part of the evidence in each case without testimony or other formality as to admissibility. Such files may not be examined by the applicant, except

the applicant may examine his application or any paper which he has submitted in connection with his application or appeal. The applicant may appear and testify in his own behalf, be represented by counsel subject to the provisions of § 51.161, present witnesses and offer other evidence in his own behalf. The applicant and all witnesses may be cross-examined by any member of the Board or its counsel. If any witness whom the applicant wishes to call is unable to appear personally, the Board may, in its discretion, accept an affidavit by him or order evidence to be taken by deposition. Such depositions may be taken before any person designated by the Board and such designee is hereby authorized to administer oaths or affirmations for the purpose of the depositions. The Board shall conduct the hearing proceedings in such manner as to protect from disclosure information affecting the national security or tending to disclose or compromise investigative sources or methods.

§ 51.164. *Admissibility.*—The Board and the applicant may introduce such evidence as the Board deems proper. Formal rules of evidence shall not apply, but reasonable restrictions shall be imposed as to the relevancy, competency, and materiality of evidence presented to the Passport Office's stated reasons for its decision and/or to the application of § 51.135 or § 51.136 to applicant's case.

§ 51.165. *Argumentation.*—All argumentation shall be directed to the application of the passport regulations to the facts of the particular case. The Board will permit no oral argument or motions relative to the legality or propriety of the hearing or other procedures of the Board. Submission of such argument or motions will be confined to the filing of written briefs, objections, or motions to be made a part of the record. The Board will not undertake to consider any such motion or contention.

§ 51.166. *Privacy of hearings.*—Hearing shall be private. There shall be present at the hearing only the members of the Board, Board's Counsel, official stenographers, Departmental employees concerned,

the applicant, his counsel, and the witnesses. Witnesses shall be present at the hearing only while actually giving testimony.

§ 51.167. *Misbehavior before Board.* — If, in the course of a hearing before the Board, an applicant or attorney is guilty of misbehavior, he may be excluded from further participation in the hearing. In addition, he may be excluded from participation in any other case before the Board.

§ 51.168. *Transcript of hearings.* — A complete verbatim stenographic transcript shall be made of hearings by qualified reporters, and the transcript shall constitute a permanent part of the record. Upon request, the applicant and each witness shall have the right to inspect the transcript of his own testimony.

§ 51.169. *Notice of decision.* — The Board shall communicate the action recommended under § 51.140 on all cases appealed to it, to the Secretary of State. The decision of the Secretary of State shall be notified in writing to the applicant. Such notice shall be given the applicant as promptly as possible after his hearing before the Board.

§ 51.170. *Probative value of evidence.*—In determining whether there is a preponderance of evidence supporting the denial of a passport the Board shall consider the entire record, including the transcript of the hearing and such confidential information as it may have in its possession. The Board shall take into consideration the inability of the applicant to meet information of which he has not been advised, specifically or in detail, or to attack the creditability of confidential informants.

8. The pertinent portions of the regulations of the Secretary of State titled "Travel Control of Citizens and Nationals in Time of War or National Emergency", as republished at 22 F.R. 10836 (22 C.F.R. 53.1-53.7) provide, as follows:

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§53.2. *Limitations upon travel.* — No citizen of the United States or person who owes allegiance to

the United States shall depart from or enter into or attempt to depart from or enter into any part of the United States . . . , unless he bears a valid passport which has been issued by or under authority of the Secretary of State or unless he comes within one of the exceptions prescribed in § 53.3.

§ 53.3 *Exceptions to regulations in § 53.2* . No valid passport shall be required of a citizen of the United States or a person who owes allegiance to the United States:

* * * * *

(b) When traveling between the United States and any country or territory in North, Central or South America or in any island adjacent thereto: *Provided,* That this exception shall not be applicable to any such person when traveling to or arriving from a place outside the United States for which a valid passport is required under this part, if such travel is accomplished via any country or territory in North, Central, or South America or in any island adjacent thereto * * *.

§ 53.5 *Prevention of departure from or entry into the United States.*—(a) Nothing in this part shall be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing the departure from or entry into the United States . . . of a citizen of the United States or a person who owes allegiance to the United States unless he bears a passport, card of identification, or other document of identity issued by or under authority of the Secretary of State, notwithstanding the fact he may be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

(b) Nor shall anything in the regulations in this part be construed as prohibiting the Secretary of State or his representative at a port in the United States from preventing temporarily the departure from or entry into the United States . . . of a citizen of the United States or a person who owes allegiance

to the United States, notwithstanding the fact that such person may bear a valid passport, card of identification, or other document of identity issued by or under authority of the Secretary of State or be destined for or arriving from a place outside any such territory of the United States for which a valid passport is not required under the regulations in this part.

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